

ALABAMA PRACTICE SERIES

Alabama Pattern Jury
Instructions—Civil


Third Edition
2020-2021

Alabama Pattern Jury Instructions
Committee—Civil

Volume 1



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ALABAMA PATTERN JURY INSTRUCTIONS CIVIL

THIRD EDITION

2020–2021

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**Prepared by the Alabama Pattern Jury
Instructions Committee—Civil,
An Alabama Nonprofit Corporation**

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PUBLISHER'S PREFACE TO THE 2020–2021 REVISION

Alabama Pattern Jury Instructions—Civil (APJI) enables both trial counsel and judges to focus on the same applicable issues of the case. This essential set clearly states controlling legal principles in simple, conversational language that every juror will be able to understand. The text enables you to tailor instructions to your case. This 2020–2021 revised Third Edition reflects the ongoing efforts of the Alabama Pattern Jury Instruction Committee (Civil) to convert existing instructions into Plain Language, as well as other updates to reflect the latest developments in case law.

The Alabama Pattern Jury Instructions Committee does not submit the instructions to the Supreme Court of Alabama before publication. Therefore, contrary to either perception or common belief, the Court does not pre-approve them.

Changes and updates appearing in the 2020–2021 revision include rewritten railroad instructions, revised APJI 20.08, revised APJI 31.04, and updated references.

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The Alabama Pattern Jury Instructions Committee (Civil) was formed in 1967. The Alabama Circuit Judges Association, the Alabama Trial Lawyers Association, and the Alabama Defense Lawyers Association jointly formed the Committee for the purpose of aiding the bench and bar in the instruction of trial juries. That endeavor was undertaken as a project of The Alabama Program of Continuing Legal Education with the cooperation of the Alabama State Bar. The goal of that committee was "to draft model instructions that would be concise, legally accurate, unslanted and in simple understandable language."

A non-profit corporation was formed in 1973 to publish the work of the committee. At the same time, at the request of the committee, the Supreme Court created a Standing Committee on Alabama Pattern Jury Instructions (Civil) to review the work of the committee and make suggestions for new instructions. From 1973 until 2018 the Supreme Court Committee members also served on the board of the Alabama Pattern Jury Instructions Committee-Civil Corporation, an Alabama non-profit corporation. The Committee has met monthly to review and improve existing instructions and to add new instructions as required. The Corporation has met as such at least annually to approve and adopt the work of the committee and submit it to the publisher. In pursuit of the goal of the committee, both entities have devoted themselves to the service of three constituencies; the appellate courts of Alabama, with particular emphasis on accuracy; the trial bench and bar of Alabama, with particular emphasis on unslanted fairness, and; the public as it is represented by juries, with particular emphasis on understandability. The Supreme Court abolished the Supreme Court Committee in 2018 to avoid confusion about whether it pre-approved the committee's instructions.

The Alabama Pattern Jury Instructions Committee continues today as originally created, a non-profit corporation with the same goals. Originally and for over 50 years its

ALABAMA PATTERN JURY INSTRUCTIONS

members are a balance of judges, plaintiffs lawyers and defense lawyers who volunteer their time, experience and talent to produce instructions which accurately reflect decisions and statutes of the courts and legislature of Alabama.

The Committee devotes the proceeds from this publication to the work of the committee and the promotion of legal education in this state through endowed APJI scholarships at the University of Alabama School of Law and the Cumberland School of Law at Samford University.

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PREFACE

Chapter 1 contains plain language instructions. In addition, the instructions in Chapter 21 are rewritten in plain language and included in this chapter.

**APJI 1.00 INTRODUCTION TO CHAPTER 1
[PL]**

The goal of a jury trial is a reliable verdict; therefore, it is critical that the jury clearly understand the issues; the law; how it decides facts; and how it uses the law to reach a verdict. The trial judge's responsibility is to communicate, not just tell, these things to the jury. *American Cast Iron Pipe Co. v. Williams*, 591 So. 2d 854, 856 (Ala. 1991); *Long v. Wade*, 980 So. 2d 378 (Ala. 2007) (Murdock, J., concurring in result).

All the instructions in this chapter are patterned on the new "Plain language" instructions that supplement this work. The issue instructions, 1.29 through 1.33, are rewritten in "Plain language" and were formerly published in Chapter 21.

An issue instruction tells the jury what the lawsuit is about and what points the parties dispute. This information makes it easier for the jury to apply the law to the facts. The instruction should tell the jurors in a clear and concise way about the claims and defenses and what they have to decide.

The Committee recommends that the trial judge give issue instructions before testimony begins. The suggestions in this chapter are limited to a few common cases faced by trial judges. In any case not covered by this chapter, give an issue instruction that identifies a party as plaintiff or defendant, etc., only once, and thereafter, to the extent possible, refer to the parties by name. A clear instruction does not state abstract principles of law; rather, it is tailored to the facts of the case. Avoid legalese, and use plain language and commonly understood words. The Committee recognizes that there are legal terms of art that must be used; but it is advisable to avoid legal jargon, legal phrases, and technical words and phrases. The chapters on medical negligence; products liability; principal and agent; contracts; fraud; negligence; wantonness; and damages are revised in "plain language"; therefore, please refer to them when preparing issue instructions for a case that involves those claims and subjects.

When certain issues are not disputed, the Committee recommends the judge outline them and the jury instructed to accept them as true.

When no evidence is offered on an issue, it should be withdrawn from the jury's consideration.

Notes on Use

This introduction is intended as a guide for judges and lawyers only. Do not read to the jury.

References

Mobile Gas Service Corp. v. Robinson, 20 So. 3d 770 (Ala. 2009).

Baldwin County Elec. Membership Corp. v. City of Fairhope, 999 So. 2d 448 (Ala. 2008).

American Cast Iron Pipe Co. v. Williams, 591 So. 2d 854, 856 (Ala. 1991). “[I]t is the duty of the trial court to instruct the jurors fully and correctly on the applicable law of the case and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth.”

Grayco Resources, Inc. v. Poole, 500 So. 2d 1030 (Ala. 1986).

Alabama Farm Bureau Mut. Ins. Service, Inc. v. Jericho Plantation, Inc., 481 So. 2d 343 (Ala. 1985).

South Highlands Infirmary v. Galloway, 233 Ala. 276, 171 So. 250, 253 (1936). The jury is presumed to understand the court's instructions.

Torian v. Ashford, 216 Ala. 85, 112 So. 418 (1927). Statements in judicial opinions are not always proper for instructions in another case.

Yates v. BMW of North America, Inc., 642 So. 2d 937 (Ala. Civ. App. 1993).

West's Key Number Digest, Trial ☞202, 228(1) and 228(5).

Am. Jur. 2d, Jury § 2.

Am. Jur. 2d, Pleading §§ 860 to 864.

APJI 1.00**ALABAMA PATTERN JURY INSTRUCTIONS**

Am. Jur. 2d, Trial §§ 920, 956, 957, 963, 964, 967, 969, 984 to 990, 992.

Arthur J. Hanes, Jr., Bert S. Nettles and Leila H. Watson, The “Plain Language” Project of The Alabama Pattern Jury Instructions Committee—Civil, 68 Ala. Law. 369 (Sept. 2007).

Peter M. Tiersma, Communicating With Juries: How to Draft More Understandable Instructions, 10 Scribes J. Legal Writing 1 (2005–2006).

Ronald W. Eades, The Problem of Jury Instructions in Civil Cases, 27 Cumb. L. Rev. 1017 (1996–1997).

A.L.R. Library

Litigant’s participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 A.L.R.2d 937.

**APJI 1.01 GENERAL INSTRUCTION BEFORE
AND DURING TRIAL [PL]**

We are about to begin the trial of this civil case. Before we begin, I will explain everyone's role and how the case will progress.

Notes on Use

It is highly desirable to use an orientation instruction to explain some of the rules before the beginning of the trial. It is desirable to explain the case and give basic instructions on the law.

Use instructions 1.01 through 1.15 together or in combination after jury selection and before the lawyers, opening statements.

Use instructions 1.11 through 1.28 at any appropriate time.

Use the appropriate issue instruction after jury selection and before the lawyers opening statements.

References

Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 *Law and Psychol. Rev.* 67 (1998).

Ronald W. Eades, *The Problem of Jury Instructions in Civil Cases*, 27 *Cumb. L. Rev.* 1017 (1996—1997).

Bert S. Nettles and Amy Lynn Stuedeman, *APJI'S Contributions to the Legal Profession Enrich Law Schools*, 62 *Ala. L. Rev.* 268 (July 2000).

Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 *Ala. L. Rev.* 441 (1997).

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Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 *A.L.R.5th* 1.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 *A.L.R.3d* 128.

Admissibility, in civil case, of juror's affidavit or testimony relating to juror's misconduct outside jury room, 32 *A.L.R.3d* 1356.

APJI 1.01**ALABAMA PATTERN JURY INSTRUCTIONS**

Use of intoxicating liquor by jurors: civil cases, 6 A.L.R.3d 934.

Proper procedure upon illness or other disability of civil case juror, 99 A.L.R.2d 684.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Juror's relationship to witness, in civil case, as ground of disqualification or for reversal or new trial, 85 A.L.R.2d 851.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 A.L.R.2d 1288.

Juror's previous knowledge of facts of civil case as disqualification, 73 A.L.R.2d 1312.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 A.L.R.2d 158.

Contact or communication between juror and party or counsel during trial of civil case as ground for mistrial, new trial, or reversal, 62 A.L.R.2d 298.

APJI 1.02 DUTY OF JUDGE AND JURY [PL]

In a jury trial, my role is to move the trial along; to rule on objections and other legal questions; and to explain the law and how you use it to reach a verdict. Your role as jurors is to follow the law as I explain it to you. Your verdict must be based on the facts you decide from the evidence and the law I have explained to you.

Notes on Use

Use this instruction to orient the jury and it may be used in the final jury instructions.

References

Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600, 1 Media L. Rep. (BNA) 1220 (1966).

Mobile Gas Service Corp. v. Robinson, 20 So. 3d 770 (Ala. 2009).

See generally Ex parte Malone, 12 So. 3d 60 (Ala. 2008) (plurality opinion) (the trial court has the authority to manage its affairs to achieve the orderly and expeditious disposition of its cases).

Mangiafico v. Street, 767 So. 2d 1103 (Ala. 2000).

McArdle v. State, By and Through Alabama State Docks Dept., 408 So. 2d 491 (Ala. 1981).

Raines v. Williams, 397 So. 2d 86 (Ala. 1981).

Christopher v. Heimlich, 523 So. 2d 466 (Ala. Civ. App. 1988).

Agri-Business Supply Co., Inc. v. Hodge, 447 So. 2d 769, 38 U.C.C. Rep. Serv. 738 (Ala. Civ. App. 1984).

West's Key Number Digest, Jury ⌚1; Trial ⌚13.6 to 18.6, 182, 202, 306, 337; Courts ⌚72.

1 Ally W. Howell, Trial Handbook for Alabama Lawyers § 6:4 (3d ed. 2007).

Am. Jur. 2d, Jury §§ 2, 15, 16, 19, 21.

Am. Jur. 2d, Trial §§ 596, 602, 603, 631, 920, 921.

John Clark, *The Social Psychology of Jury Nullification*, 24 *Law and Psychol. Rev.* 39 (2000).

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Propriety of trial court order limiting time for opening or closing argument in civil case—state cases, 71 A.L.R.4th 130.

Use of drugs as affecting competency or credibility of witness, 65 A.L.R.3d 705.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 A.L.R.2d 826.

Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging litigants, witnesses, or subject matter of litigation—modern cases, 35 A.L.R.5th 1.

Justification and correction of remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as otherwise requiring new trial or reversal, 54 A.L.R.6th 429.

APJI 1.03 JURY IS JUDGE OF FACTS [PL]

You are the judges of the facts. You must try to reconcile the testimony of all the witnesses to make them all speak the truth, if this can be done reasonably. If you cannot reasonably reconcile all of the testimony, then it is your duty to decide what is true. In so doing you may accept or reject any part of the testimony of any witness, and accept only the testimony you consider worthy of belief.

Notes on Use

Use this instruction to orient the jury and you may use it in the final instruction.

See APJI 15.02, Credibility of Witness.

See APJI 15.16, Witness Swearing Falsely.

References

Ex parte Malone, 12 So. 3d 360 (Ala. 2008).

McCombs v. Bruno's, Inc., 667 So. 2d 710 (Ala. 1995).

McArdle v. State, 408 So. 2d 491 (Ala. 1981).

Cook v. Sweatt, 282 Ala. 177, 209 So. 2d 891 (1965).

West's Key Number Digest, Trial ¶134, 139.

Am. Jur. 2d, Jury §§ 2, 15, 16, 19, 21.

Am. Jur. 2d, Trial §§ 596, 602, 603, 613, 620, 624 to 626, 628, 629, 631, 1014 to 1017.

A.L.R. Library

Comment Note: Credibility of witness giving uncontradicted testimony as matter for court or jury, 62 A.L.R.2d 1191.

**APJI 1.04 STATEMENTS BY LAWYERS AND
JUDGE [PL]**

A lawyer's duty is to represent (his/her) client. The lawyer's responsibilities are to present evidence, to object to improper evidence, and to fully argue (his/her) client's case. What the lawyers or I say to you is not evidence. The evidence will come from the witnesses and exhibits.

Notes on Use

Use this instruction to explain the lawyer's duty and responsibilities and to explain that the lawyers' and judge's statements are not evidence.

References

Mobile Gas Service Corp. v. Robinson, 20 So. 3d 770 (Ala. 2009).

Prattville Memorial Chapel v. Parker, 10 So. 3d 546 (Ala. 2008).

Keller v. American Medical Intern., Inc., 534 So. 2d 244 (Ala. 1988).

West's Key Number Digest, Trial ¶18, 29 to 29.1, 114, 202.

Am. Jur. 2d, Trial §§ 276 to 306, 533 to 704, 1013.

II Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence §§ 277.01, 472.01(3) (6th ed. 2009).

1 Ally W. Howell, Trial Handbook for Alabama Lawyers § 6:3 (3d ed. 2007).

A.L.R. Library

Justification and correction of remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as otherwise requiring new trial or reversal, 54 A.L.R.6th 429.

Propriety of trial court order limiting time for opening or closing argument in civil case—state cases, 71 A.L.R.4th 130.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 A.L.R.4th 602.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 16 A.L.R.4th 589.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial, or reversal, 93 A.L.R.3d 556.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694.

Statement by counsel relating to race, nationality, or religion in civil action as prejudicial, 99 A.L.R.2d 1249.

Prejudicial effect, in argument or summation in civil case, of attacks upon opposing counsel, 96 A.L.R.2d 9.

Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 A.L.R.2d 1072.

Prejudicial effect of counsel's remarks, in opening statement in personal injury action, as to plaintiff's family circumstances, number of children, or the like, 68 A.L.R.2d 990.

Libel and slander: statements in counsel's argument to jury as privileged, 61 A.L.R.2d 1300.

Prejudicial effect of counsel's addressing individually or by name particular juror during argument, 55 A.L.R.2d 1198.

Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396.

Counsel's appeal in civil case to wealth or poverty of litigants as ground for mistrial, new trial, or reversal, 32 A.L.R.2d 9.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—federal cases, 78 A.L.R. Fed. 23.

**APJI 1.05 OPENING STATEMENTS BY
LAWYERS [PL]**

(Name of lawyer) is the lawyer for plaintiff(s) (name of plaintiff(s)). (He/she) will begin the trial by making an opening statement. When (he/she) is finished, the lawyer (name of lawyer) for the defendant(s) (name of defendant(s)) will make an opening statement. An opening statement is intended to give you an outline of the case and to tell you what the lawyer expects the evidence will show.

Notes on Use

Use this instruction to reintroduce the lawyers and parties and to explain the purpose of the opening statements.

References

Nationwide Mut. Ins. Co. v. Smith, 280 Ala. 343, 194 So. 2d 505 (1966).

Wilkey v. State ex rel. Smith, 238 Ala. 595, 192 So. 588 (1939).

Chamberlain v. Gaillard, 26 Ala. 504, 1855 WL 341 (1855).

West's Key Number Digest, Trial ¶25, 29, 109.

II Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 472.01(3) (6th ed. 2009).

1 Ally W. Howell, Trial Handbook for Alabama Lawyers § 7:1 (3d ed. 2007).

Am. Jur. 2d, Trial §§ 407, 409, 429, 430, 432 to 437, 442.

A.L.R. Library

Propriety of trial court order limiting time for opening or closing argument in civil case—state cases, 71 A.L.R.4th 130.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 A.L.R.4th 602.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 16 A.L.R.4th 589.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial, or reversal, 93 A.L.R.3d 556.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694.

Propriety and prejudicial effect of reference by plaintiff's counsel, in jury trial of personal injuries or death action, to amount of damages claimed or expected by his client, 14 A.L.R.3d 541.

Prejudicial statement by counsel relating to race, nationality, or religion in civil action, 99 A.L.R.2d 1249.

Prejudicial effect, in argument or summation in civil case, of attacks upon opposing counsel, 96 A.L.R.2d 9.

Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 A.L.R.2d 1072.

Prejudicial effect of counsel's remarks, in opening statement in personal injury action, as to plaintiff's family circumstances, number of children, or the like, 68 A.L.R.2d 990.

Libel and slander: statements in counsel's argument to jury as privileged, 61 A.L.R.2d 1300.

Prejudicial effect of counsel's addressing individually or by name particular juror during argument, 55 A.L.R.2d 1198.

Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 A.L.R.2d 1396.

Counsel's appeal in civil case to wealth or poverty of litigants as ground for mistrial, new trial, or reversal, 32 A.L.R.2d 9.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 24 A.L.R.6th 747.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—federal cases, 78 A.L.R. Fed. 23.

APJI 1.06 TAKING EVIDENCE [PL]

After the opening statements, witnesses are called to testify. First, (name of plaintiff(s)) will call witnesses and then (name of defendant(s)) may call witnesses. All witnesses are sworn to tell the truth, and their testimony is evidence. Also, exhibits may be put into evidence. At the end of the trial, you will decide the case based upon all of this evidence.

Notes on Use

This is an orientation instruction.

References

West's Key Number Digest, Trial ¶59 to 72.

II Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 433.01 (6th ed. 2009).

Am. Jur. 2d, Trial §§ 248 to 309.

A.L.R. Library

Admissibility, in civil proceeding, of evidence obtained through unlawful search and seizure, 105 A.L.R.5th 1.

Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 A.L.R.3d 1018.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 890.

APJI 1.07 INTEREST OF WITNESS [PL]

When deciding the facts, you should consider the interest any witness may have in the outcome of this case. You may consider the interest or bias a witness may show (may have shown) while testifying. You may consider the behavior and appearance of a witness while testifying. You should also use the same standards you would use in your everyday life when you must decide whether someone is telling the truth. Examine the testimony based on your own experiences and reach a verdict that is based on what you find is true.

Notes on Use

Use this instruction to orient the jury and it may be used in the final instruction.

See APJI 15.02, Credibility.

References

II Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 469.01 (6th ed. 2009).

Am. Jur. 2d, Trial §§ 1179, 1181, 1184.

A.L.R. Library

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 A.L.R.4th 602.

Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 A.L.R.3d 327.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness' inability to testify, 11 A.L.R.3d 1360.

Necessity and sufficiency of foundation for discrediting evidence showing bias or prejudice of adverse witness, 87 A.L.R.2d 407.

Comment Note: Credibility of witness giving uncontradicted testimony as matter for court or jury, 62 A.L.R.2d 1191.

APJI 1.07**ALABAMA PATTERN JURY INSTRUCTIONS**

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—federal cases, 78 A.L.R. Fed. 23.

**APJI 1.08 RULINGS ON EVIDENCE AND
OBJECTIONS [PL]**

During the trial, I will rule on objections by the lawyers about whether certain evidence can be presented. It is a lawyer's job to make objections if the lawyer believes that an objection is proper. Do not concern yourself with why I rule as I do, because my ruling is based on rules of law. You must not guess about what the possible testimony or exhibits may have been. If I overrule an objection and allow the evidence, my ruling does not indicate whether you should believe that evidence. You should consider that evidence along with all of the other evidence in the case. You must not consider any evidence that I exclude.

Notes on Use

Use this instruction as a part of the orientation instruction and it may be adapted to the final instructions.

References

II Charles W. Gamble and Robert J. Goodwyn, *McElroy's Alabama Evidence* § 426.01 (1), (2) (6th ed. 2009).

Am. Jur. 2d, Trial §§ 208, 215, 310.

A.L.R. Library

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 890.

APJI 1.09 LAWYERS' FINAL ARGUMENTS [PL]

When all the evidence is in, each lawyer will speak to you again in what is called final argument. In their arguments the lawyers may discuss the evidence, suggest conclusions you should find from the evidence, and suggest what your verdict should be. The plaintiff(s)'s lawyer(s) will argue first. Then the defendant(s)'s lawyer(s) will argue. The law allows the plaintiff(s)'s lawyer(s) to argue last.

Notes on Use

Use this instruction as a part of the orientation instruction, and it can be modified and used in the final instructions.

References

II Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 277.01 (6th ed. 2009).

West's Key Number Digest, Trial ⇨109, 111, 114.

Am. Jur. 2d, Trial §§ 443 to 471, 538, 1040.

**APJI 1.10 DUTY OF JURY UPON SUBMISSION
[PL]**

After the lawyers' final arguments, I will tell you the rules and the law you must follow to come to a unanimous verdict. When you go back to the jury room select a foreperson to lead your discussion. You will then consider the evidence and decide the case. The foreperson will sign and bring the verdict form back to the court (and announce your verdict).

Approved October 11, 2013

Notes on Use

Use this instruction as a part of the orientation instruction.

References

Am. Jur. 2d, Trial § 539.

**APJI 1.11 JURORS NOT TO DISCUSS CASE
DURING TRIAL [PL]**

Until you have heard all of the evidence in the case and have received my instructions, you must not talk about the case with anyone or let anyone talk about it with you. You must keep an open mind and not decide the case until I tell you to decide the case.

You must not discuss the case among yourselves or with anyone until the case is over. This means that you must not discuss the case in person, in writing, on the phone, or on the Internet. You must not “tweet,” “blog,” or communicate by any other means, anything about the case during the trial and deliberations.

If members of your family or friends or anyone else asks you about the case, you should tell them that the judge told you not to discuss it. The lawyers, parties and witnesses are not allowed to talk to you, and you can’t talk to them during the trial. Even a conversation that has nothing to do with the case would look bad. If the participants in the trial fail to greet you or talk with you during the trial, it is because of this rule.

Notes on Use

Use this instruction as part of the orientation instruction.

References

2 Ally W. Howell, Trial Handbook for Alabama Lawyers § 42:6 (3d ed. 2007).

Am. Jur. 2d, Trial §§ 1381, 1382.

A.L.R. Library

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 A.L.R.2d 158.

Contact or communication between juror and party or counsel

GENERAL INSTRUCTIONS

APJI 1.11

during trial of civil case as ground for mistrial, new trial, or reversal, 62 A.L.R.2d 298.

Prejudicial effect, in civil case, of communications between witnesses and jurors, 52 A.L.R.2d 182.

**APJI 1.12 JURORS NOT TO MAKE
INVESTIGATION [PL]**

You must decide this case based upon the evidence presented in court and the law I give you. No juror should attempt to make an individual investigation of the facts, the law, or of the location(s) testified about. You cannot gather evidence or research the law for yourself or anybody else.

You must not investigate the facts, the law, or any party or witness, on the Internet or otherwise, (visit the scene of the accident) (attempt to inspect or examine any object or property unless that object or property has been received in evidence and the inspection is made in the court room or in the jury room).

We have learned that some jurors in other cases have tried to research the law or the facts of a case so they can learn more about the case they are hearing. A juror cannot consider facts that are not in evidence.

If there is anything about this case or similar cases in the news media or on the Internet, you must not read, listen to, or watch the report. Do not use the Internet or any other method to investigate any aspect of the case. This is because your verdict must be based only on the legal evidence that is presented in the courtroom.

Any juror misconduct can cause your verdict to be thrown out. If you learn that any juror has violated this instruction, you must tell me or one of the attendants about it.

Notes on Use

This instruction may be given as part of the orientation instruction or at any other point during the trial. The committee suggests that the instruction be given before any overnight recess.

References

Ex parte Arthur, 835 So. 2d 981 (Ala. 2002).

Sharrief v. Gerlach, 798 So. 2d 646 (Ala. 2001).

Fulton v. Callahan, 621 So. 2d 1235 (Ala. 1993).

City of Tuskegee v. Taylor, 519 So. 2d 472 (Ala. 1987).

Magee v. Williams, 17 So. 3d 687 (Ala. Civ. App. 2009).

West's Key Number Digest, New Trial ⇨42(1), 44(1), 44(3), 44(4), 56.

I Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence §§ 10.05, 208.01 (6th ed. 2009).

2 Ally W. Howell, Trial Handbook for Alabama Lawyers § 42:12 (3d ed. 2007).

Am. Jur. 2d, Trial §§ 1319 to 1325, 1390.

A.L.R. Library

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 A.L.R.2d 512.

Prejudicial effect of indicating to the jury in a civil case the desire of a party for a view by the jury, 76 A.L.R.2d 766.

Prejudicial effect, in civil case, of communications between witnesses and jurors, 52 A.L.R.2d 182.

Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 A.L.R.2d 1128.

**APJI 1.13 JURORS MUST NOT REFER TO
OUTSIDE MATERIALS [PL]**

There may be some words or phrases or terms used during the trial that need to be defined. I will tell you the legal definition. The legal definition may be different from what you normally understand. If this happens, you must accept the Court's definition. You should not try to find the definition of any word or phrase by looking it up in any book, dictionary, encyclopedia, the Internet, or any other source. It would be highly improper for you to do so.

Notes on Use

This instruction is necessary because of the numerous jury verdicts overturned for juror misconduct. It is designed to forcefully impress upon the jurors that they are not to seek the definition of some of the words and phrases from a dictionary or other books unless the books are an exhibit in the case.

References

Fulton v. Callahan, 621 So. 2d 1235 (Ala. 1993).

Nowogorski v. Ford Motor Co., Inc., 579 So. 2d 586 (Ala. 1990).

Magee v. Williams, 17 So. 3d 687 (Ala. Civ. App. 2009).

West's Key Number Digest, New Trial ¶44(1), 44(3), 56.

I Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 10.05 (6th ed. 2009).

2 Ally W. Howell, Trial Handbook for Alabama Lawyers §§ 42:12, 42:14 (3d ed. 2007).

1 Walter B. Jones, Alabama Jury Instructions § 201 (West 1953).

Am. Jur. 2d, Trial §§ 1323 to 1325.

A.L.R. Library

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

GENERAL INSTRUCTIONS

APJI 1.13

Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 A.L.R.2d 512.

Prejudicial effect of indicating to the jury in a civil case the desire of a party for a view by the jury, 76 A.L.R.2d 766.

Prejudicial effect, in civil case, of communications between witnesses and jurors, 52 A.L.R.2d 182.

Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 A.L.R.2d 1128.

APJI 1.14 JURORS TAKING NOTES [PL]

You may take notes during the trial. The notes are not evidence. You must rely on your own memory and collective memory of what the evidence is.

Notes on Use

Use this instruction to explain to jurors how they can use their notes.

The court in *Denson v. Stanley*, 17 Ala. App. 198, 84 So. 770 (1918), reversed on other grounds, *Ex parte Stanley*, 203 Ala. 408, 84 So. 773 (1919), held that the jurors may take notes, but cannot be requested to do so, and that taking notes should not cause delay or undue consumption of time. The jurors in *Denson* recorded the calculations and figures introduced in evidence, and the court of appeals of Alabama stated: “under proper conditions, we think that it might be very desirable for jurors to make notes of testimony, so that they might use it in arriving, not only at a fair verdict, but a correct finding according to mathematical calculations.” *Denson v. Stanley*, 17 Ala. App. 198, 84 So. 770 (1918), reversed on other grounds, *Ex parte Stanley*, 203 Ala. 408, 84 So. 773 (1919).

In *Hooks v. State*, 45 Ala. App. 221, 228 So. 2d 833 (Crim. App. 1969), the Alabama Court of Criminal Appeals restated the *Denson* ruling and upheld the propriety of note taking where notes were made about testimony and the court’s final charge. However, the Court carefully noted that the juror did not read aloud, in the presence of the jurors, her notes relating to the testimony.

Alabama follows the great majority of State and Federal Courts by allowing note taking at the discretion of the trial judge. See *Taking and use of trial notes by jury*, 36 A.L.R.3d 255. Although Alabama has not expressly so held, most jurisdictions hold that the trial judge commits no reversible error when, at the request of either counsel (which should be made out of the hearing of jury) or the jury itself, the judge permits or refuses to prohibit the taking of trial notes by the jury.

References

Thompson Properties 119 AA 370, Ltd. v. Birmingham Hide and Tallow Co., Inc., 897 So. 2d 248 (Ala. 2004) (juror took notes about court’s oral instruction).

Reece v. Simpson, 437 So. 2d 68 (Ala. 1983).

Poole v. State, 650 So. 2d 541 (Ala. Crim. App. 1994).

West's Key Number Digest, Trial ⇨304.

I Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 10.02 (6th ed. 2009).

2 Ally W. Howell, Trial Handbook for Alabama Lawyers § 42:10 (3d ed. 2007).

Am. Jur. 2d, Trial §§ 1376, 1377.

Leonard Pertnoy, The Juror's Need to Know vs. the Constitutional Right to a Fair Trial, 97 Dick. L. Rev. 627 (1993).

Standard 2, American Bar Association Civil Trial Practice Standards (updated 2007).

A.L.R. Library

Taking and use of trial notes by jury, 36 A.L.R.5th 255.

Propriety and effect of jury in civil case taking depositions to jury room during deliberations, 57 A.L.R.2d 1011.

**APJI 1.15 JURORS QUESTIONING WITNESSES
[PL]**

If you want to ask a witness a question, write it and give it to the court. If it is an allowable question, I will let the witness answer it.

Notes on Use

See APJI 1.22, Questions by the Jury During Deliberations.

The problem of how to handle a juror's wish to question a witness has for a long time been difficult to solve by trial judges and embarrassing to trial lawyers. The courts are seemingly not agreed on a solution.

Some practical principles have developed from the decided cases and from experience. The judge should not encourage jurors to ask questions. He or she should strictly control any that are asked. Normally, a statement by the court that a proposed question by a juror should be withheld until after the lawyers have completed their questioning and that if there is then some question in the juror's mind, the inquiry may be allowed, is wise and solves the problem. The question, if permitted, should be given to the judge in writing. The court can then decide whether the question is allowable.

The trial court has discretion to control questioning by jurors. The practice should not be encouraged because usually it serves no worthwhile purpose and disrupts orderly trial procedure.

References

Ex parte Malone, 12 So. 3d 60 (Ala. 2008).

West's Key Number Digest, Witnesses ⇨246(1).

I Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 121.09 (6th ed. 2009).

2 Ally W. Howell, Trial Handbook for Alabama Lawyers § 42:11 (3d ed. 2007).

Am. Jur. 2d, Trial §§ 1378, 1379.

Ala. R. Evid. 611.

Standard 3, American Bar Association Civil Trial Practice Standards (Updated 2007).

Kara Lundy, Note, Juror Questioning of Witnesses: Questioning the U.S. Criminal Justice System, 85 Minn. L. Rev. 2007 (2001).

Laurie Forbes Neff, Comment, The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error, 28 Pepp. L. Rev. 437 (2001).

A.L.R. Library

Propriety of jurors asking questions in open court during course of trial, 31 A.L.R.3d 872.

APJI 1.16 to 1.20

Reserved

**APJI 1.21 INTRODUCTION TO REQUESTED
WRITTEN INSTRUCTIONS [PL]**

In addition to the instructions the court has already given you, I will now read the following instructions. These are also correct statements of the law.

Notes on Use

It is now customary to incorporate written requested instructions into the court's oral instruction. Therefore, in practice this instruction will rarely be given. If the trial judge reads requested instructions to the jury, the trial judge may give this instruction before reading the instructions.

However, keep in mind that abstract instructions are not acceptable jury instructions. *Birmingham-Jefferson County Transit Authority v. Arvan*, 669 So. 2d 825 (Ala. 1995) (not error to refuse to instruct using APJI 1.02 because there was no evidence that justified giving it). An abstract instruction is an instruction that "states a proposition of law in the abstract without instructing the jury on the effect of the rule on the facts adduced at trial" 669 So. 2d at 829. Even verbatim quotes from appellate court opinions may not be a correct instruction in a particular trial. *Taylor v. General Motors Corp.*, 707 So. 2d 198, Prod. Liab. Rep. (CCH) P 15126 (Ala. 1997); *Britton v. Doebling*, 286 Ala. 498, 242 So. 2d 666 (1970). Moreover, "[a]n academic recitation of the language of a statute without any directions as to how it may be applied to the disputed facts before the jury is too general to furnish guidance to them." *Grayco Resources, Inc. v. Poole*, 500 So. 2d 1030, 1036 (Ala. 1986) (quoting *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 487 (3d Cir. 1965), opinion amended, 370 F.2d 95 (3d Cir. 1966), (1966)).

It is essential that any instruction, either the trial court's oral instruction or a requested instruction, be justified by and tailored to the facts of the case and clearly explains the law in a way the jury can readily understand it. *Riley v. Fletcher*, 185 Ala. 570, 64 So. 85 (1913). "An ideal instruction . . . will contain a simple, clear and definite statement of the law, one easy of application by the jurors to the facts and one without any tendency to confuse or mislead the jury." *Jones*, Alabama Jury Instructions § 202 (1953).

References

Taylor v. General Motors Corp., 707 So. 2d 198, Prod. Liab. Rep. (CCH) P 15126 (Ala. 1997).

Birmingham-Jefferson County Transit Authority v. Arvan, 669 So. 2d 825 (Ala. 1995).

Grayco Resources, Inc. v. Poole, 500 So. 2d 1030 (Ala. 1986).

Britton v. Doebling, 286 Ala. 498, 242 So. 2d 666 (1970).

Riley v. Fletcher, 185 Ala. 570, 64 So. 85 (1913).

Yates v. BMW of North America, Inc., 642 So. 2d 937 (Ala. Civ. App. 1993).

West's Key Number Digest, Trial ☞228, 241, 248.

Ala. R. Civ. P. 51.

Am. Jur. 2d, Trial §§ 923 to 935, 947 to 949, 951, 953, 956 to 965, 967 to 970, 980 to 983, 984, 991, 992, 999, 1000, 1034, 1037 (pattern jury instructions).

A.L.R. Library

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions, 91 A.L.R.2d 836.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 890.

**APJI 1.22 QUESTIONS BY THE JURY DURING
DELIBERATION [PL]**

If you have a question, the foreperson should write it and give it to the court. If the question is about the law, I will discuss it with the lawyers and I will then give you an answer. I cannot answer questions about the facts; you must decide the facts.

Notes on Use

Use this as a final instruction about jury deliberations. But, it may be modified and given at any time. It seems better judgment not to encourage the asking of questions by jurors by suggesting how to do it.

The trial judge “has discretion to grant a jury request to be reinstructed; however, the better practice is to accede to the request.” *Wal-Mart Stores, Inc. v. Rolin*, 813 So. 2d 861 (Ala. 2001). “When the jury makes explicit its difficulties, the trial judge should clear them away with concrete accuracy.” *Small v. Bradley*, 825 So. 2d 850 (Ala. Civ. App. 2002).

If the question is one that the court is allowed to answer, it must be considered and discussed with the lawyers. Only then will you decide what response you will make. If the question can be answered with a short written response, and the lawyers agree that the trial judge can send a written answer to the jury, you may do it. *Dunn v. Syring*, 425 So. 2d 1081 (Ala. 1983). If it is a question that requires a discussion with the jury, the jury should be placed in the jury box. It would then be appropriate for the court to state to the jury something along this line:

Ladies and Gentlemen of the jury, the foreperson has sent to me a written question which reads (*read the question*). I have considered the question and discussed it with the lawyers. (*Then answer the question*).

References

Wal-Mart Stores, Inc. v. Rolin, 813 So. 2d 861 (Ala. 2001).

Dunn v. Syring, 425 So. 2d 1081 (Ala. 1983).

Small ex rel. Small, 825 So. 2d 850 (Ala. Civ. App. 2002).

West's Key Number Digest, Trial ⚡312(1).

Am. Jur. 2d, Trial §§ 1447 to 1454.

A.L.R. Library

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases, 35 A.L.R.4th 626.

Prejudicial effect of jury's procurement or use of book during deliberations in civil cases, 31 A.L.R.4th 623.

Propriety of juror's tests or experiments in jury room, 31 A.L.R. 4th 566.

Propriety and effect of jury in civil case taking depositions to jury room during deliberations, 57 A.L.R.2d 1011.

**APJI 1.23 INSTRUCTION WHEN JURORS
UNABLE TO AGREE [PL]**

It is your duty as jurors to make every effort to agree on a unanimous verdict.

You must take the time necessary to try to reach a verdict. Trials are expensive and time consuming, and if you cannot reach a verdict the case will have to be retried. These parties have chosen you to be the jury in their dispute. They deserve your best efforts to reach a verdict and conclude this case.

When you return to the jury room, each of you should re-examine the basis of your own opinions. You should ignore any opinion that you came to hastily or through bias or prejudice. Carefully consider your own position and weigh the evidence solely with the purpose of determining the truth. After you have done that you should consult the other jury members. Look at and discuss your differences with a spirit of fairness and consideration and reason together. Of course, during your deliberations, no one should stand out in an unruly, unreasonable, or stubborn way.

It is not my purpose to force or convince you to surrender your convictions, if those convictions are honest and founded on the evidence and the law. If your position is based upon stubbornness or not upon a consideration of the evidence and the law, you should set those opinions aside and listen to the positions of your fellow jurors. My purpose is to remind of you your duty to reach a verdict in this case.

Please go back to the jury room and deliberate further.

Approved October 11, 2013

Notes on Use

A trial judge often is confronted with a situation when a jury, after deliberating for some time, reports that it is hopelessly

deadlocked. There are three choices: (1) declare a mistrial; (2) ignore the statement of the jury and have it continue its deliberations without comment from the court; or (3) call the jury into the courtroom for what is often referred to as an “Allen or Dynamite Instruction.” Instructions similar to APJI 1.23 generally have been approved by both Federal and State Courts. The Supreme Court of Alabama in *Ashford v. McKee*, 183 Ala. 620, 62 So. 879, 884 (1913), abrogation recognized, *Duncan v. Early*, 142 So. 3d 1135 (Ala. Civ. App. 2013), stated, “it is the duty of trial judges to expedite the trial of causes when it can be done in a manner entirely consistent with fairness and justice.”

Ashford set out what a trial judge can and cannot do when it gives an Allen instruction, as follows:

“Of course there should be nothing in the intercourse of the court with the jury having the least appearance of duress or coercion. Any attempt to influence the jury by referring to the length of time which the court proposes to keep them together, or the inconvenience to which they may be so pertinacious as to adhere to their individual opinions, and thus disagree, cannot be justified. *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108 (1887); *De Jarnette v. Cox*, 128 Ala. 518, 29 So. 618 (1900). On the other hand, as well expressed in 11 Encyc. of Pl. & Pr. p. 304: “The trial judge is vested with large discretion in the conduct of judicial proceedings, and he may properly admonish the jury [about] the desirability and importance of agreeing on a verdict, and may urge them to make every effort to do so consistent with their consciences. He may advise jurors to lay aside mere pride of judgment, and not adhere to an opinion regardless of what the other jurors may say, merely through stubbornness, to examine any existing difference in a spirit of fairness and candor, and to reason together and talk over such differences and harmonize them, if possible. So, also, the court may urge as reasons for agreeing on a verdict the time and expense which a new trial would entail. But it is not proper to give an instruction censuring jurors for not agreeing with the majority.’” *Ashford*, 62 So. at 885.

The Supreme Court in *Ashford* held that an instruction urging the jury to agree if it can, without any individual juror yielding his convictions, does not “constitute instructions in the sense that requires counsel to be present when the Court charges or instructs the jury.” It is suggested, however, that before giving this instruction the trial judge should follow the suggestion contained in the Illinois Pattern Jury Instructions and those instructions are:

1. Before the trial judge attempts to ascertain whether

the jury is deadlocked, both counsel should be present along with the reporter. At that time, the court should, on the record, state the facts concerning any communication from the jury, or, if there has been no communication, the length of time the jury has been deliberating, and inform counsel that he proposes to give the instruction, giving them an opportunity to object if they so desire.

2. In the presence of both counsel and the reporter, the jury should be returned to the box, and the court, after cautioning them not to reveal the numerical division in the voting or which side has the preponderance, should ask the foreman if they are able to reach a verdict. If they are not, he should then give this instruction and return them to the jury room to deliberate further. Notes on Use, Illinois Pattern Jury Instructions, Civil No. 1.05 (2009 ed.).

Jones, Alabama Jury Instructions § 6570 (1953); Scruggs, Jury Instructions; Allen v. U.S., 164 U.S. 492 (1896). However, the courts have neither fully approved nor embraced the language in Allen, U.S. v. Brown, 411 F.2d 930 (7th Cir. 1969); U.S. v. Chaney, 559 F.2d 1094 (7th Cir. 1977).

Smallwood v. Walling, 657 So. 2d 843, 845 (Ala. 1995) cites old APJI 1.21 with approval and states, “[i]t is an excellent practice for the trial court, in an Allen charge, to specifically warn the jurors against violating their consciences” Phoenix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108 (1887) (error to tell jurors they would be kept until the end of term (12 days) unless they returned a verdict before that time); Ashford v. McKee, 183 Ala. 620, 62 So. 879 (1913), abrogation recognized, Duncan v. Early, 142 So. 3d 1135 (Ala. Civ. App. 2013).

References

Smallwood v. Walling, 657 So. 2d 843 (Ala. 1995).

Veal v. Teleflex, Inc., 586 So. 2d 188, Prod. Liab. Rep. (CCH) P 12958 (Ala. 1991), rev’d on other grounds, Vesta Fire Ins. Corp. v. Milam & Co. Const, Inc., 901 So. 2d 84, 101-04 (Ala. 2004).

Lomax v. Speed, 507 So. 2d 455 (Ala. 1987).

Seaboard System R.R., Inc. v. Page, 485 So. 2d 326 (Ala. 1986).

Rouse v. Wiley, 440 So. 2d 1023 (Ala. 1983).

West's Key Number Digest, Trial ⌘56; New Trial ⌘314(1).

1 Ally W. Howell, Trial Handbook for Alabama Lawyers § 17.13 (3 ed. 2007).

Am. Jur. 2d, Trial §§ 1343 to 1360.

89 C.J.S., Trial § 815.

Samantha P. Bateman, Blast It All: Allen Charges and the Dangers of Playing with Dynamite, 32 U. Haw. L. Rev. 323 (2010).

Note and Comment on Instructing Deadlocked Juries, 78 Yale L. J. 100 (1968).

A.L.R. Library

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

APJI 1.24 SYMPATHY [PL]

When making any decision in this case you should not let sympathy, prejudice, or emotion influence you. All parties are equal under the law and must be treated equally.

Notes on Use

This instruction may be used in the orientation, but it is usually given as part of the final instruction.

References

Ridgeview Health Care Center, Inc. v. Meadows, 590 So. 2d 243 (Ala. 1991) (per curiam).

Black Belt Wood Co., Inc. v. Sessions, 514 So. 2d 1249 (Ala. 1986).

Fountain v. Phillips, 439 So. 2d 59 (Ala. 1983).

Gordon v. Nall, 379 So. 2d 585 (Ala. 1980).

Chrysler Corp. v. Hassell, 291 Ala. 267, 280 So. 2d 102 (1973).

West's Key Number Digest, Trial ¶125, 217.

APJI 1.25 JURY NOT TO TAKE CUE FROM JUDGE [PL]

Under our system, I am the judge of the law. You, the jury, are the only judges of the facts. It is up to you to determine whether a witness is telling the truth. I cannot give you my opinion of the case or comment on the evidence. You should not consider any rulings I have made or anything that I have said or done as an indication from me about how you should decide the case.

Notes on Use

Use this instruction in the final instruction. However, if given in the future tense, it can be included in the “orientation instruction.”

References

West’s Key Number Digest, Trial ☞193.

Am. Jur. 2d, Trial §§ 208, 211 to 216, 218 to 220, 228 to 235, 1014 to 1017.

Ala. R. Civ. P. 51.

A.L.R. Library

Prejudicial effect of trial judge’s remarks, during civil jury trial, disparaging litigants, witnesses, or subject matter of litigation—modern cases, 35 A.L.R.5th 1.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 A.L.R.2d 826.

Prejudicial effect of judge’s disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

**APJI 1.26 INSTRUCTION BEFORE JURY
VISITS SCENE [PL]**

The court is going to allow you to visit the (property/scene) so that you can see it for yourself. The reason for allowing you to visit the (property/scene) is to help you understand the evidence. At the (property/scene) you are not to ask any questions or talk about what you may see there. Keep in mind there may have been some changes since (the date of occurrence/filing the petition).

Notes on Use

Use this instruction when the court allows a jury to visit the scene or the property, and give it before the visit.

The Alabama Supreme Court has consistently held that it is within the discretion of the trial court to allow or refuse to allow a jury to visit a scene or property during trial. Some factors the trial court should consider when deciding whether to allow the jury to visit the scene are stated in *Parker v. Randolph County*, 475 So. 2d 1193 (Ala. Civ. App. 1985).

References

Kohn v. Johnson, 565 So. 2d 165 (Ala. 1990).

Macon County Com'n v. Sanders, 555 So. 2d 1054 (Ala. 1990).

Rutledge v. Brilliant Coal Co., 247 Ala. 40, 22 So. 2d 428 (1945).

Watt v Lee, 238 Ala. 451, 191 So. 628 (1939).

White v Thorington, 219 Ala. 101, 120 So. 914 (1929).

Morris v Corona Coal Co., 215 Ala. 47, 109 So. 278 (1926). "The court has the inherent right to permit the jury to view the locus in quo provided this is done under proper protection against undue influence or parol testimony not given under sanction of the oath of the court."

Parker v. Randolph County, 475 So. 2d 1193 (Ala. Civ. App. 1985).

West's Key Number Digest, Trial Ⓒ28(1), 28(2).

I Charles W. Gamble and Robert J. Goodwyn, McElroy's Alabama Evidence § 208.01 (6th ed. 2009).

Am. Jur. 2d, Trial §§ 195 to 203.

A.L.R. Library

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 A.L.R.2d 512.

Prejudicial effect of indicating to the jury in a civil case the desire of a party for a view by the jury, 76 A.L.R.2d 766.

Prejudicial effect, in civil case, of communications between witnesses and jurors, 52 A.L.R.2d 182.

Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 A.L.R.2d 1128.

**APJI 1.27 CURATIVE INSTRUCTION—
LIABILITY INSURANCE [PL]**

Liability insurance has been mentioned in this case. You should not consider whether a party was insured or not. I (will instruct/have instructed) you on the issues in this case, and those issues are the only ones you are to decide the case on.

Notes on Use

Use this instruction when liability insurance is improperly injected or the jury inquires about it before or during jury deliberations. The committee recommends prompt use of this instruction to avoid more drastic corrective action; however, more drastic corrective action may be more appropriate in a particular situation.

References

I Charles W. Gamble and Robert S. Goodwin, McElroy's Alabama Evidence §§ 45.05, 189.04(11) (6th ed. 2009).

Ally W. Howell, Trial Handbook for Alabama Lawyers § 36:22 (3d ed. 2007).

Ally W. Howell, Alabama Personal Injury & Torts § 14:46 (2012).

William A. Schroeder and Jerome A. Hoffman, Hoffman and Schroeder on Alabama Evidence § 4:96 (3d ed. 2000).

Ala. Code § 12-16-150(12) (1975) (West's Alabama Code).

Ala. R. Civ. P. 18(c).

Ala. R. Evid. 411(1).

**APJI 1.28 INSTRUCTION TO JURY UPON
DISCHARGE [PL]**

After the verdict, you are free to discuss the case or not. You may discuss it with the lawyers or the parties if you want to, but if you don't want to talk to them, just tell them and that will end the discussion.

Notes on Use

The following is Principle 18(C) and comment about post-trial contact of jurors by anyone from the American Bar Association Principles for Juries and Jury Trials (2005):

Principle 18 (C): At the conclusion of the trial, the court should instruct the jurors that they have the right to either discuss or to refuse to discuss the case with anyone, including counsel or members of the press.

Subdivision C. illustrates the established practice of instructing the jury on their right to discuss or not discuss the case with anyone, including the press. Most jurors have not been through the trial process before, and may be unprepared to deal with media requests and related public attention. Jurors should be instructed that they do not have to speak with anyone regarding their service, if that is their preference; however, they are free to speak with the media, counsel, family members or others, if they so choose. Judges may suggest that jurors discuss among themselves how best to handle media requests. Judges may ask jurors to respect the deliberative process and the candor of their fellow jurors. TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS CASES 94-97 (1998); *United States v. Giraldi*, 858 F.Supp. 85 (S.D. Tex. 1994).

**APJI 1.29 SIMPLE NEGLIGENCE CLAIM—
GENERAL DENIAL (EXAMPLE—
MOTOR VEHICLE COLLISION) [PL]**

This case is about the collision of Plaintiff (name of plaintiff)'s and Defendant (name of defendant)'s (describe the vehicles, e.g., truck, motorcycle) on (date) at (location).

(Name of plaintiff) says that (he/she/it) was harmed by (name of defendant)'s negligent conduct (describe the conduct plaintiff says was negligent). (Name of defendant) agrees there was a collision, but denies the other things (name of plaintiff) says. You must decide whether (name of defendant) is responsible for the harm (name of plaintiff) says (name of defendant) caused.

To decide whether (name of defendant) is responsible, you must decide these three issues:

1. Was (name of defendant) negligent;
2. Was (name of plaintiff) harmed; and
3. If (name of defendant) was negligent, did it cause (name of plaintiff)'s harm.

If you decide all three issues for (name of plaintiff), you must then decide what amount of money will fairly and reasonably compensate (name of plaintiff) for the harm. If you do not decide all three of the issues for (name of plaintiff), you will find for (name of defendant).

Notes on Use

This instruction is an example. It can be expanded to all claims for negligent conduct.

Use this instruction when the plaintiff claims negligence against one defendant and the defendant denies the claim. It can be used as a template to instruct on a claim against multiple defendants for combining and concurring causes.

Negligence is defined in APJI 28.01. Combined and Concurrent Causes, APJI 28.03. Combined and Concurrent Causes-Defendant With a Non-Party, APJI 28.02.

References

See references in Chapter 28.

West's Key Number Digest, Negligence ⌘201, 370; Trial ⌘233(1), 246(2), 246(2.1).

Am. Jur. 2d, Pleading §§ 403, 404.

**APJI 1.30 WANTON-WILLFUL CLAIM—
GENERAL DENIAL (EXAMPLE—
MOTOR VEHICLE COLLISION) [PL]**

This case is about the collision of Plaintiff (name of plaintiff)'s and Defendant (name of defendant)'s (describe vehicles) on (date) at (location).

(Name of plaintiff) says that (he/she/it) was harmed by (name of defendant)'s (wanton, willful) conduct (describe the conduct). (Name of defendant) agrees there was a collision, but denies the other things (name of plaintiff) says. You must decide whether (name of defendant) is responsible for the harm (name of plaintiff) says (name of defendant) caused.

To decide whether (name of defendant) is responsible, you must decide these three issues:

1. Was (name of defendant)'s conduct (wanton) (willful);
2. Was (name of plaintiff) harmed; and
3. If (name of defendant)'s conduct was (wanton) (willful), did it cause (name of plaintiff)'s harm.

If you decide all three issues for (name of plaintiff), you must decide what amount of money will fairly and reasonably compensate (name of plaintiff) for the harm. In addition, if you find for (name of plaintiff), you must also decide whether you will award punitive damages to (name of plaintiff). But, if you do not decide all three issues for (name of plaintiff), you will find for (name of defendant).

Notes on Use

This instruction is an example. It can be expanded to all claims for wanton and willful conduct.

Use this instruction when the plaintiff claims the defendant's conduct was wanton or willful, and defendant denies the claim. It

can be used as a template to instruct on a claim against multiple defendants for combined and concurrent causes.

Wantonness is defined in APJI 29.00. Willful Conduct, APJI 29.01. Combined and Concurrent Causes, APJI 28.03. Combined and Concurrent Causes-Defendant With a Non-Party, APJI 28.02.

References

Ex parte Essary, 992 So. 2d 5 (Ala. 2007).

Hooper v. Columbus Regional Healthcare System, Inc., 956 So. 2d 1135 (Ala. 2006).

Stanley v. Hayes, 276 Ala. 532, 165 So. 2d 84 (1964).

Dickey v. Russell, 268 Ala. 267, 105 So. 2d 649 (1958).

West's Key Number Digest, Automobiles ⇨246(3); Negligence ⇨201, 275, 370, 1740.

Am. Jur. 2d, Pleading §§ 348, 349.

A.L.R. Library

Standard for judging conduct of minor motorist charged with gross negligence, recklessness, willful or wanton misconduct, or the like, under guest statute or similar common-law rule, 97 A.L.R.2d 861.

Right of tortfeasor guilty of only ordinary negligence to be indemnified by one guilty of intentional wrongdoing, wanton misconduct, or gross negligence, 88 A.L.R.2d 1355.

**APJI 1.31 NEGLIGENCE CLAIM—
CONTRIBUTORY NEGLIGENCE
DEFENSE (EXAMPLE—MOTOR
VEHICLE COLLISION) [PL]**

(Name of defendant) denies (he/she/it) was negligent and the other things (name of plaintiff) says. In addition, (name of defendant) says that (name of plaintiff)’s own negligence was a cause of (his/her/its) harm (describe the conduct). This is called contributory negligence, and it is a complete defense to (name of plaintiff)’s claim.

If you find that (name of defendant) was negligent, and that the negligence caused (name of plaintiff)’s harm, but if you also find that (name of plaintiff) was negligent and (his/her/its) negligence was a cause of the harm, you will find for (name of defendant).

Notes on Use

This instruction is an example.

Use this instruction when plaintiff claims the defendant is negligent and the defendant pleads contributory negligence.

Contributory negligence is defined in APJI 30.00.

Contributory negligence is not a defense to a claim for wanton or willful conduct.

When defendant files a counterclaim use APJI 21.04.

References

See references in Chapter 30.00.

Bohannon v. Driskell, 519 So. 2d 1314, 1318 (Ala. 1988). The court stated unequivocally in the body of the opinion that the term “slightest degree” should not be used. However, the court stated that if used it must be considered in the context of the entire instruction, and its use may not always be reversible error.

Hamilton v. Kinsey, 337 So. 2d 344, 345 (Ala. 1976). “The

term slightest degree should not be used in [an instruction] on contributory negligence. The [instruction] found in Alabama Pattern Jury [Instructions], § 21.03, . . . , should be used where the defendant raises contributory negligence in his answer.” The reference to APJI 21.03 is a reference to the old instruction.

West’s Key Number Digest, Automobiles ⚡41, 41.1, 202, 202.1, 231, 239(2); Negligence ⚡201, 202, 501, 550, 553, 554, 1743 to 1747; Trial ⚡233(1).

Am. Jur. 2d, Pleading §§ 270, 271, 278.

A.L.R. Library

Motorcyclist’s failure to wear helmet or other protective equipment as affecting recovery for personal injury or death, 85 A.L.R. 4th 365.

Automobile occupant’s failure to use seat belt as contributory negligence, 92 A.L.R.3d 9.

Modern development of comparative negligence doctrine having applicability to negligence actions generally, 78 A.L.R.3d 339.

Contributory negligence as defense to action for injury or damage caused by accidental starting up of parked motor vehicle, 43 A.L.R.3d 930.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence, 37 A.L.R.3d 1438.

Pilot’s contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident, 35 A.L.R.3d 614.

Propriety of attaching photographs to a pleading, 33 A.L.R.3d 322.

Contributory negligence or assumption of risk of one injured by firearm or air gun discharged by another, 25 A.L.R.3d 518.

Comment Note.—Contributory negligence of spouse or child as bar to recovery of collateral damages suffered by other spouse or parent, 21 A.L.R.3d 469.

Comment Note.—Age and mentality of child as affecting application of attractive nuisance doctrine, 16 A.L.R.3d 25.

Contributory negligence of child injured while climbing over or through railroad train blocking crossing, 11 A.L.R.3d 1168.

Claim, for contribution or indemnity against joint tortfeasor, of employer liable to employee under Federal Employee's Liability Act, as affected by contributory negligence of employee, 6 A.L.R.3d 1307.

Rescue doctrine: negligence and contributory negligence in suit by rescuer against rescued person, 4 A.L.R.3d 558.

Contributory negligence or assumption of risk as defense to action for personal injury, death, or property damage resulting from alleged breach of implied warranty, 4 A.L.R.3d 501.

Pleading of election of remedies, 99 A.L.R.2d 1315.

Comment Note.—Contributory negligence of mentally incompetent or mentally or emotionally disturbed person, 91 A.L.R.2d 392.

Propriety and prejudicial effect of instructions referring to the degree or percentage of contributory negligence necessary to bar recovery, 87 A.L.R.2d 1391.

Comment Note.—Distinction between assumption of risk and contributory negligence, 82 A.L.R.2d 1218.

Comment Note.—Momentary forgetfulness of danger as contributory negligence, 74 A.L.R.2d 950.

Contributory negligence or assumption of risk as defense to action for damages from nuisance—modern views, 73 A.L.R.2d 1378.

Counsel's right, in summation in civil case, to point out inconsistencies between opponent's pleading and testimony, 72 A.L.R.2d 1304.

Necessity and manner of pleading assumption of risk as a defense, 59 A.L.R.2d 239.

Contributory negligence of physically handicapped or intoxicated person in boarding or alighting from standing train or car, 30 A.L.R.2d 334.

Comment Note.—Contributory negligence as a defense to a cause of action based upon violation of statute, 10 A.L.R.2d 853.

GENERAL INSTRUCTIONS

APJI 1.31

Contributory negligence as defense to action by state, United States, municipality, or other governmental unit, 1 A.L.R.2d 827.

**APJI 1.32 NEGLIGENCE CLAIM-
COUNTERCLAIM &
CONTRIBUTORY NEGLIGENCE [PL]**

Plaintiff (name of plaintiff) says that (he/she/it) was harmed by defendant (name of defendant)'s negligent conduct (describe the conduct). (Name of defendant) has filed a counter-claim against (name of plaintiff). (Name of defendant) says that (he/she/it) was harmed by (name of plaintiff)'s negligent conduct (describe the conduct). Only one of them can recover in this case because you cannot find for either if both were negligent and the negligence of each caused harm to the other. You must decide if either is responsible for the harm each says was caused by the other.

To decide if either is responsible, you must decide these three issues:

1. Was either party negligent;
2. Was either party harmed; and
3. If either party was negligent, did it cause harm to the other party.

If you find that (name of plaintiff) was harmed by (name of defendant)'s negligence, and (name of plaintiff)'s conduct was not a cause of (his/her/its) harm, you will find for (name of plaintiff). If you find for (name of plaintiff), you must decide what amount of money will fairly and reasonably compensate (him/her/it) for the harm.

If you find that (name of defendant) was harmed by (name of plaintiff)'s negligence, and (name of defendant)'s conduct was not a cause of (him/her/its) harm, you will find for (name of defendant). If you find for (name of defendant), you must decide what amount of money will fairly and reasonably compensate (him/her/it) for the harm.

Notes on Use

Use this instruction when defendant pleaded contributory negligence and filed a counter-claim for negligence. It can be modified to fit other situations.

References

See references in Chapters 28, 29, and 30.

West's Key Number Digest, Automobiles ⚡246(2), 246(22), 246(23); Negligence ⚡553, 554, 1741; Trial ⚡233(1).

Ala. R. Civ. P. 13.

Am. Jur. 2d, Counterclaim, Recoupment, and Setoff §§ 32, 38, 39 to 48.

Am. Jur. 2d, Pleading §§ 270 to 281.

A.L.R. Library

Cause of action in tort as counterclaim in tort action, 10 A.L.R.2d 1167.

Claim for wrongful death as subject of counterclaim or cross action in negligence action against decedent's estate, and vice versa, 6 A.L.R.2d 256.

APJI 1.33 BREACH OF CONTRACT [PL]

Plaintiff (name of plaintiff) says that (he/she/it) and Defendant (name of defendant) had a contract (briefly describe the contract), and that (name of defendant) breached the contract (briefly describe the breach) and caused (name of plaintiff) harm. (Name of defendant) denies (he/she/it) breached the contract.

You must decide:

1. Did the parties have a contract;
2. If so, did (name of plaintiff) do the things the contract required (him/her/it) to do; and
3. Did (name of defendant) fail to do something the contract required (him/her/it) to do.

If you find these three issues for (name of plaintiff), you must then decide whether (he/she/it) was harmed by (name of defendant)'s breach. If (name of plaintiff) was harmed, you must decide what amount of money will fairly and reasonably compensate (him/her/it) for the harm.

Approved October 11, 2013

Notes on Use

Use this instruction in a simple breach of contract case. If the defendant files a counterclaim, use APJI 21.05 and APJI 10.14 models.

Contract is defined in APJI 10.01. Elements for action for breach, APJI 10.01. Defenses to contract, APJI 10.23 through 10.29. Damages, APJI 10.35 through 10.40.

References

See the references to the instructions in Chapter 30.

A.L.R. Library

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Right of garnishee, other than bank holding deposit, to set off claims not due or certain when garnishment is served, 57 A.L.R.2d 700.

Waiver or estoppel with respect to debtor's assertion, as setoff or counterclaim against assignee, of claim valid as against assignor, 51 A.L.R.2d 886.

Subrogation or reimbursement, from decedent's estate, of persons other than personal representative or surviving spouse paying funeral expenses, 35 A.L.R.2d 1399.

Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or rescission by vendee, 14 A.L.R.2d 1347.

Purchase of claims against corporation by officer or director thereof, 13 A.L.R.2d 1172.

Chapter 2

Accord and Satisfaction [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 2.00 Accord and Satisfaction—Defined [PL]
- APJI 2.01 Original Demand Unliquidated [PL]
- APJI 2.02 Demand Liquidated and Disputed [PL]
- APJI 2.03 Claim and Amount Undisputed [PL]
- APJI 2.04 Accord and Satisfaction by Written Notation on a Check [PL]

Title of Instruction	Date Approved	Prior Instruction Number
2.00 Accord and Satisfaction—Defined [PL]	5/8/15	2.00
2.01 Original Demand Unliquidated [PL]	5/8/15	2.01
2.02 Demand Liquidated and Disputed [PL]	5/8/15	2.02
2.03 Claim and Amount Undisputed [PL]	5/8/15	2.03
2.04 Accord and Satisfaction by Written Notation on a Check [PL]	5/8/15	New
		2.04 (Deleted)

**APJI 2.00 ACCORD AND SATISFACTION—
DEFINED [PL]**

(Name of defendant) says (name of plaintiff) cannot recover because there was an accord and satisfaction.

An accord is an agreement between (name of plaintiff) and (name of defendant) where (name of plaintiff) agrees to accept less money than (he/she/it) claims (name of defendant) owes. The satisfaction is the payment of the agreed amount. (Name of defendant) must prove an accord and satisfaction.

Approved May 8, 2015

Notes on Use

The instructions in this chapter are based on a debt. However, the affirmative defense of accord and satisfaction applies to obligations other than debt. If the lawsuit involves doing something other than the payment of money, the instructions must be altered to fit the circumstances being tried.

Accord and satisfaction is defined as “an agreement between competent parties regarding payment of a debt the amount of which is in dispute.” *Newson v. Protective Industrial Ins. Co. of Alabama*, 890 So. 2d 81, 83 (Ala. 2003) (quoting *Leisure American Resorts, Inc. v. Carbine Const. Co., Inc.*, 577 So. 2d 409, 411 (Ala. 1990) (citations omitted)).

The elements of an accord and satisfaction are: (1) proper subject matter, (2) competent parties, (3) assent or meeting of the minds, and (4) consideration. *Wallace v. Wallace*, 909 So. 2d 827, 831 (Ala. Civ. App. 2005) (quoting *Ray v. Alabama Cent. Credit Union*, 472 So. 2d 1012, 1014 (Ala. 1985) (internal citation omitted)). Proper subject matter means there was an honest or good faith dispute between the parties about whether any money was due or how much money was due. *Tatum v. Cater*, 270 Ala. 445, 119 So. 2d 223 (1960).

There is no accord and satisfaction without the intentional relinquishment of a known right. *Newson v. Protective Industrial Ins. Co. of Alabama*, 890 So. 2d 81, 87 (Ala. 2003).

Competency as it relates to a mental state and what a party

must show to prove incompetency are discussed in *Shoals Ford, Inc. v. Clardy*, 588 So. 2d 879 (Ala. 1991). See Ala. Code §§ 8-1-170 to 172 (1975) (West's Alabama Code).

An accord and satisfaction and a novation are distinguished in *Golden v. Bank of Tallassee*, 639 So. 2d 1366 (Ala. 1994) and *Global Minerals Corp. v. Nucor Steel Tuscaloosa, Inc.*, 490 Fed. Appx. 239, 243 (11th Cir. 2012) (not selected for publication in the Federal Supplement).

An accord and satisfaction and a release are distinguished in *Hartford Acc. & Indem. Co. v. Cochran Plastering Co., Inc.*, 935 So. 2d 462, 469 (Ala. Civ. App. 2006). See Ala. Code § 8-1-23 (1975) (West's Alabama Code).

Liquidated demand, liquidated claim, and unliquidated claim are addressed in the References.

References

Ala. Code §§ 8-1-20 to 22 (1975) (West's Alabama Code).

Ala. R. Civ. P. 8(c). Accord and satisfaction is an affirmative defense.

Austin v. Cox, 492 So. 2d 1021, 1022 (Ala. 1986).

Ray v. Alabama Cent. Credit Union, 472 So. 2d 1012, 1014 (Ala. 1985).

Tatum v. Cater, 270 Ala. 445, 119 So. 2d 223 (1960).

Biggers v. Ingersoll, 236 Ala. 646, 184 So. 478 (1938). Ala. Code §§ 8-1-20 to 22 (1975) (West's Alabama Code) are declaratory of the common law on accord and satisfaction.

Wallace v. Wallace, 909 So. 2d 827 (Ala. Civ. App. 2005).

Cobb v. General Motors Acceptance Corp., 589 So. 2d 728 (Ala. Civ. App. 1991). An accord can be an express or oral agreement; however, an oral agreement requires new consideration. New consideration can be something substantial that the debtor was not already required to do.

West's Key Number Digest, Accord and Satisfaction ☞1 et seq.

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 11:6, 17:7 (6th ed. 2012).

1 Ally W. Howell, Alabama Personal Injury and Torts § 3:7 (2014).

Am. Jur. 2d, Accord and Satisfaction §§ 1 et seq.

Liquidated demand, unliquidated demand, liquidated claim, and unliquidated claim.

Madden v. Deere Credit Services, Inc., 598 So. 2d 860, 863 (Ala. 1992) states: “A claim is defined as ‘liquidated’ or ‘unliquidated’ under the following conditions:

When a debtor knows precisely how much he is to pay and to whom he is to pay it, his debt is a liquidated one. An amount claimed to be due is a liquidated sum when it is susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in the possession or knowledge of the party to be charged. It is sufficient for this purpose if the debt is measurable by a fixed or established external standard, or by a standard apparent from the documents upon which the plaintiff bases his claim. Unliquidated damages, on the other hand, are those which are not yet reduced to a certainty in respect to amount, nothing more being established than the plaintiff’s right to recover; or such as cannot be fixed by a mere mathematical calculation from the ascertainable data in the case.” (internal citations and quotation marks omitted).

A liquidated demand that will prevent an accord and satisfaction exists when the amount due has been ascertained and agreed on by the parties or is fixed by operation of law. *Wilson v. Monette*, 224 Ala. 106, 139 So. 264 (1932). But, new consideration can accomplish an accord and satisfaction. APJI 2.03. See, *Wallace v. Wallace*, 909 So. 2d 827, 843 (Ala. Civ. App. 2005), *Crawley, J.*, dissenting (“A liquidated demand in this connection . . . [exists] when the amount due has been ascertained and agreed upon by the parties.”).

An unliquidated demand is “[a] claim in which the liability of the party or the amount is in dispute.” *Black’s Law Dictionary*, Unliquidated Claim p. 240 (7th ed. 1999). A claim is unliquidated if “one of the parties to the contract cannot alone render certain.” *Jenelle Mims Marsh*, Alabama Law of Damages § 5:1 (6th ed. 2012).

**APJI 2.01 ORIGINAL DEMAND
UNLIQUIDATED [PL]**

(Name of defendant) says (name of plaintiff) cannot recover because there was an accord and satisfaction. (Name of defendant) says the accord was (state the terms of the accord).

(Name of plaintiff) and (name of defendant) may have an accord and satisfaction even though (name of defendant) paid (name of plaintiff) less money than (name of plaintiff) claimed (name of defendant) owed.

To prove an accord and satisfaction, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of defendant) and (name of plaintiff) had an honest dispute about how much money (name of defendant) owed (name of plaintiff);
2. (Name of plaintiff) and (name of defendant) were competent to agree;
3. (Name of plaintiff) and (name of defendant) understood and accepted all the essential terms of the accord; and,
4. (Name of defendant) paid the money (name of plaintiff) agreed to accept.

If (name of defendant) proved all these things, you must find for (name of defendant).

Approved May 8, 2015

Notes on Use

Use this instruction only when the demand itself was unliquidated. See the discussion about liquidated demand, unliquidated demand, liquidated and unliquidated claims in the references in APJI 2.00.

APJI 2.01

ALABAMA PATTERN JURY INSTRUCTIONS

If the demand itself was liquidated and disputed, use APJI 2.02 and do not use this instruction.

If the original amount and claim were undisputed, use APJI 2.03 and do not use this instruction.

References

Tatum v. Cater, 270 Ala. 445, 119 So. 2d 223 (1960).

See, J.F. Morgan Paving Co. v. Carroll, 211 Ala. 121, 123, 99 So. 640, 641 (1924) (there was no dispute about whether the amount or debt was owed). “Accord and satisfaction consists of two elements expressed in that phrase. Accord arises in the following classes of cases: (1) Where the demand itself is unliquidated or in dispute [APJI 2.02]. In such case the accord is the agreement to give and take a sum of money less in amount than claimed, or something in lieu of the thing promised, of less value than claimed. (2) Where the amount and nature of the demand is not in dispute [AJPI 2.03], and it is agreed to give and take a less sum, or thing of less value, than the demand, the residue being released and discharged in a legal way.”

Stremming Veneer Co. v. Jacoby, 38 Ala. App. 559, 89 So. 2d 235 (1956).

West’s Key Number Digest, Accord and Satisfaction ☞1, 7(1), 10.

West’s Key Number Digest, Payment ☞1(1).

Jenelle Mims Marsh, Alabama Law of Damages § 5:1 (6th ed. 2012).

Am. Jur. 2d, Accord and Satisfaction §§ 26, 33.

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Comment Note.—Remedies for breach of valid accord or compromise agreement involving disputed or unliquidated claim, 94 A.L.R.2d 504.

Scope and effect of Negotiable Instruments Law (sec. 122) as to renunciation of rights, 65 A.L.R.2d 593.

**APJI 2.02 DEMAND LIQUIDATED AND
DISPUTED [PL]**

(Name of defendant) says (name of plaintiff) cannot recover because there was an accord and satisfaction. (Name of defendant) says the accord was (state the terms of the accord).

(Name of plaintiff) and (name of defendant) may have an accord and satisfaction even though (name of defendant) paid (name of plaintiff) less money than (name of plaintiff) claimed (name of defendant) owed.

To prove an accord and satisfaction, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

1. There was an honest dispute about whether ((name of defendant) owed the amount claimed) ((name of defendant) owed anything);
2. (Name of plaintiff) and (name of defendant) were competent to agree;
3. (Name of plaintiff) and (name of defendant) understood and accepted all the essential terms of the accord; and,
4. (Name of defendant) paid the money (name of plaintiff) agreed to accept.

If (name of defendant) proved all these things, you must find for (name of defendant).

Approved May 8, 2015

Notes on Use

Use only where the original demand itself was liquidated and in dispute. See the discussion about liquidated demand, unliquidated demand, liquidated and unliquidated claims in the references in APJI 2.00.

APJI 2.02

ALABAMA PATTERN JURY INSTRUCTIONS

If the original demand itself was unliquidated, use APJI 2.01 and do not use this instruction.

If the original amount and claim were undisputed, use APJI 2.03 and do not use this instruction.

References

See references in APJI 2.00.

Ala. Code § 7-1-207, 7-3-311 (1975) (West's Alabama Code). Checks containing words similar to "in full of all accounts."

Tatum v. Cater, 270 Ala. 445, 119 So. 2d 223, 225 (1960). There must be a bona fide dispute about the sum actually due, or a bona fide doubt or controversy about whether anything is due.

Ex parte Southern Cotton Oil Co., 207 Ala. 704, 93 So. 662 (1922). The dispute must be honest and not fraudulent. As to liquidated claims, the payment of an amount less than that for which the debtor is liable does not constitute a valid accord and satisfaction, unless there is a bona fide dispute or controversy as to the debtor's liability or as to the amount due from him, or unless the residue was released in a legal way.

West's Key Number Digest, Accord and Satisfaction ☞1 et seq.

Am. Jur. 2d, Accord and Satisfaction §§ 27 to 29, 33, 35.

A.L.R. Library

Comment Note.—Remedies for breach of valid accord or compromise agreement involving disputed or unliquidated claim, 94 A.L.R.2d 504.

Scope and effect of Negotiable Instruments Law (sec. 122) as to renunciation of rights, 65 A.L.R.2d 593.

**APJI 2.03 CLAIM AND AMOUNT UNDISPUTED
[PL]**

(Name of defendant) does not dispute either (name of plaintiff)'s claim or the amount of the claim. But, (name of defendant) says there was an accord and satisfaction. (He/she/it) says the accord was (state the terms of the accord).

(Name of plaintiff) and (name of defendant) may have an accord and satisfaction even though (name of defendant) paid (name of plaintiff) less money than (name of plaintiff) claimed (name of defendant) owed.

To prove an accord and satisfaction, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of plaintiff) and (name of defendant) were competent to agree;

2. That (name of plaintiff) and (name of defendant) understood and accepted all the essential terms of the accord;

3. That (name of defendant) gave (name of plaintiff) new consideration for the accord. This means that (name of defendant) gave (name of plaintiff) something in addition to money or did something (name of defendant) was not required to do under the original contract; and,

4. That (name of defendant) did the things that the accord required (him/her/it) to do.

If (name of defendant) proved all these things, you must find for (name of defendant).

Approved May 8, 2015

Notes on Use

This instruction is new because APJI 2.03 (3d ed. 2014) is an instruction on release; not accord and satisfaction.

Use this instruction only when the defendant did not dispute the amount of the original claim and the validity of the original claim. However, the defendant must give new consideration.

When the demand itself was unliquidated, use APJI 2.01 and do not use this instruction.

Where the demand itself was liquidated and disputed, use APJI 2.02 and do not use this instruction.

References

Ala. Code § 8-1-23 (1975) (West’s Alabama Code) states: “An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration or in writing with or without new consideration.”

Waide v. Tractor and Equipment Co., 545 So. 2d 1327 (Ala. 1989). There was no accord and satisfaction because the purchaser did only what he was required to do under the purchase agreement.

Cf., Farmers & Merchants Bank of Centre v. Hancock, 506 So. 2d 305 (Ala. 1987) (debtor agreed in writing to allow creditor to sell the collateral without formal foreclosure proceedings; however, the issue was whether there was a meeting of the minds).

Diveto v. Mid-State Homes, Inc., 279 Ala. 277, 184 So. 2d 357 (1966).

See, Barnett v. Quinn, 979 So. 2d 816 (Ala. Civ. App. 2007). The landlord gave tenant a check with a restrictive endorsement but there was no accord and satisfaction because the landlord only did what it was required to do under the lease.

Cobb v. General Motors Acceptance Corp., 589 So. 2d 728 (Ala. Civ. App. 1991).

West’s Key Number Digest, Accord and Satisfaction ¶4, 5, 8, 10.

Am. Jur. 2d, Accord and Satisfaction §§ 27 to 29, 34.

A.L.R. Library

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 A.L.R.3d 1129.

Scope and effect of Negotiable Instruments Law (sec. 122) as to renunciation of rights, 65 A.L.R.2d 593.

**APJI 2.04 ACCORD AND SATISFACTION BY
WRITTEN NOTATION ON A CHECK
[PL]**

(Name of defendant) disputes that (he/she/it) (owes any money) (owes the amount claimed by (name of plaintiff)). (Name of defendant) says there was an accord and satisfaction, and the accord was (he/she/it) gave a check for \$_____ to (name of plaintiff) and _____ was written on the (memo line) (in the space above the endorsement). ((Name of defendant) says (he/she/it) sent a (describe the written communication) with the check to (name of plaintiff) and the (_____) stated (state what the communication said)).

(Name of defendant) says (name of plaintiff) collected on the check.

To prove an accord and satisfaction, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

1. There was an honest dispute about whether ((name of defendant) owed the amount claimed) ((name of defendant) owed anything);

2. (Name of defendant) gave the check to (name of plaintiff) with the intent to honestly enter into an accord and satisfaction and (name of defendant) observed reasonable commercial standards of fair dealing;

3. The check had a notation on it (state where the notation was) to the effect that the check was given as full satisfaction of (name of plaintiff)'s claim;

3a. The check was sent with a written communication and the written communication stated the check was in full settlement of the claim or words to that effect);

4. That within a reasonable time before (name of plaintiff) collected on the check (he/she/it) knew it was given in full satisfaction of (his/her/its) claim; and,

5. (Name of plaintiff) collected on the check.

If (name of defendant) proved all these things, you must find for (name of defendant).

Approved May 8, 2015

Notes on Use

This instruction is new, and it is based on Ala. Code § 7-3-311 (1975) (West's Alabama Code) as interpreted in *Ex parte Meztista*, 845 So. 2d 795 (Ala. 2001). Section 7-3-311 “does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute.” *Id.*, at (ii) and official comment.

Section 7-3-311 (b) requires a “conspicuous” statement. Section 7-1-201(10) defines “conspicuous” as a statement that a reasonable person ought to have noticed; however, this is a question for the trial judge.

The user must modify the instruction if the facts fall under the provisions of 7-3-311 (c).

References

Ala. Code § 7-3-311 (1975) (West's Alabama Code).

Ala. Code § 7-3-103(4) (1975) (West's Alabama Code) defines good faith.

Ala. Code § 7-3-104 (1975) (West's Alabama Code) defines check.

Ala. Code § 7-3-106 (1975) (West's Alabama Code) defines unconditional order or promise.

Ala. Code § 7-3-201(10) (1975) (West's Alabama Code) defines conspicuous.

Ala. Code § 7-3-201(43) (1975) (West's Alabama Code) defines writing and written.

APJI 2.04

ALABAMA PATTERN JURY INSTRUCTIONS

Ala. Code § 7-3-206 (1975) (West's Alabama Code) defines restrictive endorsement.

Ala. Code § 7-3-303 (1975) (West's Alabama Code) defines value and consideration.

Ex parte Meztista, 845 So. 2d 795 (Ala. 2001).

See, *Hartford Acc. & Indem. Co. v. Cochran Plastering Co., Inc.*, 935 So. 2d 462 (Ala. Civ. App. 2006) (distinguishes *Ex parte Meztisa*).

Wallace v. Wallace, 909 So. 2d 827 (Ala. Civ. App. 2005).

Southern Cotton Oil Co. v. Currie, 20 Ala. App. 1, 102 So. 149 (1922), cert. denied with opinion, *Ex parte Southern Cotton Oil Co.*, 207 Ala. 704, 93 So. 662 (1922).

In *re Boutwell*, No. 03-0355-WS-C, 2003 WL 25629875 *7 (S.D. Ala. 2003) (not published in F. Supp. 2d.). The debtor “must prove that ‘in good faith’, he sincerely and genuinely disputed the amount of . . . [the] debt when he tendered” the check to the creditor.

West's Key Number Digest, Accord and Satisfaction ☞6, 10(1), 11(2).

Chapter 3

Agency and Vicarious Liability [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 3.00 Essential Elements [PL]
- APJI 3.01 Scope of Agency or Employment [PL]
- APJI 3.02 Agent [PL]
- APJI 3.03 Servant or Employee—Definition [PL]
- APJI 3.04 Apparent Authority—Agency by Estoppel [PL]
- APJI 3.05 Deviation From Instructions [PL]
- APJI 3.06 Departure From Line and Scope [PL]
- APJI 3.07 Deviation From Authority [PL]
- APJI 3.08 Ratification of Acts by Principal [PL]
- APJI 3.09 Joint Venture—Definition and Rule of Liability [PL]
- APJI 3.10 Independent Contractor—Definition [PL]
- APJI 3.11 Independent Contractor—Rule of Liability [PL]

Chapter 3 Conversion Chart

Title of Instruction	Third Edition Instruction Number	Second Edition Instruction Number
Essential Elements	3.00	New, 3.06
Scope of Agency or Employment	3.01	3.01
Agent	3.02	3.00
Servant or Employee—Definition	3.03	New
Apparent Authority—Agency by Estoppel	3.04	3.04, 3.13
Deviation from Instructions	3.05	3.11
Departure From Line and Scope	3.06	3.09
Deviation from Authority	3.07	3.10
Ratification of Acts by Principal	3.08	3.12
Joint Venture—Definition and Rule of Liability	3.09	3.14, 3.15

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Third Edition Instruction Number	Second Edition Instruction Number
Independent Contractor—Definition	3.10	3.16
Independent Contractor—Rule of Liability	3.11	3.17

PREFACE

Chapter 3 contains plain language instructions on agency and vicarious liability. The Committee combined instructions to reduce duplication or when it determined that two separate instructions rest on the same legal underpinning. For instance, the Committee decided the law underpinning ratification and agency by estoppel is the same. Therefore, use APJI 3.04 when a party claims the principal is estopped to deny the agent’s authority or ratified the agent’s conduct.

The new instructions use the parenthetical (name of agent/servant/employee). In many cases whether an individual is an agent, a servant, or employee is legally insignificant. The parenthetical only gives the trial judge a choice of language; it does not suggest the trial judge has ruled as a matter of law on the status of an individual or entity. The trial judge may want to preface the parenthetical by saying the “claimed” agent or use other appropriate and clear language. The Committee discourages the use of the word “alleged”.

APJI 3.00 ESSENTIAL ELEMENTS [PL]

Plaintiff (name of plaintiff) says that (he/she) was harmed by (name of agent/servant/employee)'s (insert tort theory, e.g., "negligence").

(Name of plaintiff) also says that defendant (name of defendant) is responsible for the harm because (name of agent) was acting as (his/her/its) (agent/servant/employee/ (insert other relationship, e.g., "partner")) when the (insert tort theory, e.g., "negligence") happened.

(Name of defendant) is responsible for (name of plaintiff)'s harm if (name of plaintiff) proves to your reasonable satisfaction all of the following:

1. That (name of agent/servant/employee)'s (insert tort theory) caused (name of plaintiff)'s harm;
2. That (name of agent/servant/employee) was (name of defendant)'s (agent/servant/employee/(insert other relationship)); and,
3. That (name of agent/servant/employee) acted within the scope of (his/her)(agency/employment/(insert other relationship)) when (he/she) caused (name of plaintiff)'s harm.

[If (name of plaintiff) proves this, (name of defendant) is responsible for (name of plaintiff)'s harm even if (name of agent/servant/employee) is not a defendant in this lawsuit.]

Notes on Use

Use this instruction when the plaintiff claims that a defendant is liable because of agency or vicarious liability and the claim against the defendant is based on a tort committed by the agent, servant or employee.

Use the last paragraph if the agent or employee is not a defendant.

References

Merrell v. Joe Bullard Oldsmobile, Inc., 529 So. 2d 943 (Ala. 1988).

West's Key Number Digest, Labor and Employment ¶3026; Principal and Agent ¶159(1).

Am. Jur. 2d, Agency §§ 264, 267.

**APJI 3.01 SCOPE OF AGENCY OR
EMPLOYMENT [PL]**

(Name of agent/servant/employee) acted within the scope of (his/her) employment or authority if (he/she) was doing an act (he/she) was (hired/asked) to perform or the act was closely related to an act (he/she) was (hired/asked) to perform; or,

(His/her) conduct benefited (name of principal/master/employer), and (name of agent/servant/employee)'s conduct was not based on a reason that was solely personal to (name of agent/servant/employee).

References

West's Key Number Digest, Labor and Employment ☞3105(7);
Principal and Agent ☞178(1).

APJI 3.02 AGENT [PL]

(Name of claimed agent) is the agent of (name of defendant) if (he/she/it) agreed to act for (name of defendant) and (he/she/it) was controlled by (name of defendant). The agreement may be written, oral, or implied by their conduct. The agreement may be for pay or for no pay.

Notes on Use

Use this instruction to define agent.

References

West's Key Number Digest, Principal and Agent ☞1, 7 to 14(1).

Am. Jur. 2d, Agency § 1.

**APJI 3.03 SERVANT OR EMPLOYEE—
DEFINITION [PL]**

(Name of servant/employee) is the (servant/employee) of (name of defendant) if (1) (name of defendant) had the right to select or did select (name of servant/employee) to do the (task/job); and (2) (name of defendant) had the right to control how (name of servant/employee) did the (task/job).

Notes on Use

Use this instruction when the plaintiff claims the defendant is liable based on the doctrine of respondeat superior and whether a person is a servant or employee is an issue.

References

Ware v. Timmons, 954 So. 2d 545 (Ala. 2006).

**APJI 3.04 APPARENT AUTHORITY—AGENCY
BY ESTOPPEL [PL]**

Plaintiff (name of plaintiff) says that defendant (name of defendant) is responsible for the harm caused by (name of alleged agent/servant/employee) because (name of defendant) created or allowed the impression that (name of alleged agent/servant/employee) was (his/her/its) (agent/servant/employee).

(Name of defendant) is responsible for (name of plaintiff)’s harm if (name of plaintiff) proves to your reasonable satisfaction all of the following:

1. That (name of defendant) by words or other conduct either created the impression that (name of alleged agent/servant/employee) was (his/her/its) (agent/servant/employee) with authority to act for (him/her/it), or (he/she/it) allowed (name of alleged agent/servant/employee) to represent that (he/she/it) had the authority to act for (name of defendant); and
2. That (name of plaintiff) reasonably believed that (name of alleged agent/servant/employee) had the authority to act for (name of defendant); and,
3. That (name of plaintiff) was harmed because (he/she/it) relied on (his/her/its) belief.

Notes on Use

Use this instruction when the plaintiff claims the defendant is responsible for harm based on the doctrine of apparent authority.

This instruction omits the language in former APJI 3.04 “such authority cannot be established solely by the acts of the agent.” That concept is incorporated into element number 1. However, if the judge elects to use the quoted language, it should be stated at the end of element 1.

References

Rosser v. AAMCO Transmissions, Inc., 923 So. 2d 294 (Ala. 2005).

Brown ex rel. Brown v. St. Vincent's Hosp., 899 So. 2d 227 (Ala. 2004).

John Deere Const. Equipment Co. v. England, 883 So. 2d 173 (Ala. 2003).

Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003).

Wally's, Inc. v. Intergraph Corp., 727 So. 2d 34 (Ala. 1998).

Goodyear Tire & Rubber Co. v. Washington, 719 So. 2d 774 (Ala. 1998).

Malmberg v. American Honda Motor Co., Inc., 644 So. 2d 888 (Ala. 1994).

Watson v. Auto-Owners Ins. Co., 599 So. 2d 1133 (Ala. 1992).

Secor Bank v. Bailey, 596 So. 2d 900 (Ala. 1992).

Carlton v. Alabama Dairy Queen, Inc., 529 So. 2d 921 (Ala. 1988).

Wood v. Shell Oil Co., 495 So. 2d 1034 (Ala. 1986).

Northington v. Dairyland Ins. Co., 445 So. 2d 283 (Ala. 1984).
The rule of apparent authority can be invoked by one who has been misled thereby to his detriment.

State Farm Mut. Auto. Ins. Co. v. Newell, 270 Ala. 550, 120 So. 2d 390 (1960).

Langham v. Jackson, 211 Ala. 416, 100 So. 757 (1924). It is the agent's ostensible or apparent authority—that which he is held out to the world to possess—which is the test of his actual power, in the absence of knowledge of limitations thereon, on the part of persons dealing with such agent.

Blue Cross-Blue Shield v. Thornton, 56 Ala. App. 678, 325 So. 2d 187 (1975). An agent's authority is measured by powers which his principal has caused or permitted him to seem to possess, which principal by reason of his conduct is estopped to deny.

Owens v. Wood, 43 Ala. App. 366, 190 So. 2d 734 (1966). In or-

der to charge the principal because of apparent authority, a third party must prove that the principal manifested indicia of having cloaked agent with authority.

Goldfield v. Brewbaker Motors, 36 Ala. App. 152, 54 So. 2d 797 (1951), cert den 256 Ala 383, 54 So 2d 800.

West's Key Number Digest, Principal and Agent ⇨98, 99.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 37.01 to 37.09 (5th ed. 2010).

Am. Jur. 2d, Agency §§ 75 to 79.

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Authority of corporate officers to mortgage or pledge corporate personal property, 62 A.L.R.2d 712.

Implied or apparent authority of agent to purchase or order goods or merchandise, 55 A.L.R.2d 6.

Implied or apparent authority of agent selling personal property to make warranties, 40 A.L.R.2d 285.

Power of corporate officer or agent to hire employees for life, 28 A.L.R.2d 929.

Doctrine of apparent authority as applicable where relationship is that of master and servant, 2 A.L.R.2d 406.

**APJI 3.05 DEVIATION FROM INSTRUCTIONS
[PL]**

(Name of principal/master/employer) is responsible for (name of agent/servant/employee)'s conduct if (name of agent/servant/employee) acted within the scope of the agency or employment. This is true even if (name of agent/servant/employee) acted contrary to what (name of principal/master/employer) told (him/her) (to do/not to do).

Notes on Use

Use this instruction when the agent's, etc., deviation from instructions is an issue. The word "told" is not limited to an oral communication to the agent, etc. The principal's instruction to the agent, etc., can be written or oral.

References

Simpson & Harper v. Harris & Scrandrett, 174 Ala. 430, 56 So. 968 (1911).

Ala. Code § 8-2-7 (1975) (West's Alabama Code).

West's Key Number Digest, Principal and Agent ⇐150(1), 159(1).

Am. Jur. 2d, Agency § 264 (2002).

**APJI 3.06 DEPARTURE FROM LINE AND
SCOPE [PL]**

(Name of principal/master/employer) is not responsible for (name of agent/servant/employee)'s conduct when, for reasons solely personal to (name of agent/servant/employee), (he/she) abandons (name of principal/master/employer)'s work. The (principal/agent, master/servant, employer/employee) relationship is suspended while (name of agent/servant/employee) abandons (name of principal/master/employer)'s work.

Notes on Use

Use this instruction when the principal/master/employer says the agent/servant/employee departed from the line and scope of his/her employment.

References

Chamlee v. Johnson-Rast and Hays, 579 So. 2d 580 (Ala. 1990).

West's Key Number Digest, Labor and Employment ☞3047 to 3047, Principal and Agent ☞149(.5) to 151(2).

Am. Jur. 2d, Automobiles and Highway Traffic §§ 671 to 681.

APJI 3.07 DEVIATION FROM AUTHORITY [PL]

(Name of defendant principal) is not responsible for (name of agent/servant/employee)'s acts if the acts were done outside the scope of (name of agent/servant/employee)'s authority unless (name of defendant principal) ratified the acts or led (name of plaintiff) to believe that (name of alleged agent/servant/employee) acted with authority.

Notes on Use

Use this instruction when the evidence is the agent, servant, or employee acted outside the scope of authority. Because the Committee wants to omit legalese in the instructions, the language in the last paragraph is plain language for apparent authority (APJI 3.04).

The instruction on ratification is APJI 3.08.

There is a distinction between deviation from authority and deviation from instructions. For rule relative to deviation from instructions, see APJI 3.05.

The tort and negligence of the agent, done or committed in a willful departure from the course of his employment, takes the case from rule of apparent scope of his authority.

References

Jones v. Tennessee Land Co., 234 Ala. 25, 173 So. 233 (1937). The test of the master's liability is whether the act was done within the general scope of the employment or with a view to the furtherance of the master's business, or whether the servant did it to effect some other purpose without having the master's interest or service in mind.

Birmingham News Co. v. Browne, 228 Ala. 395, 153 So. 773 (1934).

West's Key Number Digest, Labor and Employment ¶3045 to 3047, 3067 to 3072; Principal and Agent ¶150(1) to 150(2), 159(.5) to 159(1), 163 to 176.

C.J.S., Agency § 256.

APJI 3.07**ALABAMA PATTERN JURY INSTRUCTIONS****A.L.R. Library**

Employee's operation of employer's vehicle outside regular working hours as within scope of employment, 51 A.L.R.2d 120.

Deviation by carrier in transportation of property, 33 A.L.R.2d 145.

**APJI 3.08 RATIFICATION OF ACTS BY
PRINCIPAL [PL]**

Defendant (name of defendant) is responsible for the harm caused by (name of agent/servant/employee) done outside the scope of (his/her/its) authority if (name of defendant) approved the conduct after it happened.

(Name of defendant) is responsible for plaintiff's (name of plaintiff) harm if (name of plaintiff) proves to your reasonable satisfaction all of the following:

1. That (name of agent/servant/employee) was acting on (name of defendant)'s behalf when (name of agent/servant/employee) harmed (name of plaintiff);
2. That (name of defendant) had adequate knowledge of all the facts and circumstances about what happened; and,
3. That with adequate knowledge, (name of defendant) conducted (himself/herself/itself) in a way that shows (he/she/it) intended to approve (name of agent/servant/employee)'s unauthorized act.

(Name of defendant) can expressly approve (name of agent/servant/employee)'s conduct, or (he/she/it) can impliedly approve the conduct.

You must decide (name of defendant)'s intent. To do so, you may consider how (he/she/it) conducted (himself/herself/itself) after (he/she/it) had adequate knowledge of (name of agent/servant/employee)'s conduct.

Notes on Use

Use this instruction in most cases when there is an issue that the principal ratified the agent's unauthorized conduct. However, the instruction must be modified when the plaintiff claims the defendant ratified conduct that is sexual harassment.

In sexual harassment cases, the plaintiff must prove that the

employer (1) had actual knowledge of the tortuous conduct by the offending employee and knowledge that the conduct was directed at and visited upon the complaining employee; (2) that based on this knowledge, the employer knew, or should have known, that the conduct constituted sexual harassment and/or a continuing tort; and (3) that the employer failed to take adequate steps in the situation. *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889, 68 Empl. Prac. Dec. (CCH) P 44177 (Ala. 1995).

References

East Alabama Behavioral Medicine, P.C. v. Chancey, 883 So. 2d 162 (Ala. 2003).

Machen v. Childersburg Bancorporation, Inc., 761 So. 2d 981, 81 Fair Empl. Prac. Cas. (BNA) 815 (Ala. 1999) (sexual harassment).

Mardis v. Robbins Tire & Rubber Co., 669 So. 2d 885, 68 Empl. Prac. Dec. (CCH) P 44177 (Ala. 1995) (sexual harassment).

Crown Life Ins. Co. v. Smith, 657 So. 2d 821 (Ala. 1994).

Potts v. BE & K Const. Co., 604 So. 2d 398, 59 Fair Empl. Prac. Cas. (BNA) 1381, 7 I.E.R. Cas. (BNA) 1355 (Ala. 1992) (sexual harassment).

Moman v. Gregerson's Foods, Inc., 570 So. 2d 1215, 60 Fair Empl. Prac. Cas. (BNA) 209, 7 I.E.R. Cas. (BNA) 1500, 61 Empl. Prac. Dec. (CCH) P 42113 (Ala. 1990) (sexual harassment).

Ex parte Jordan, 532 So. 2d 1252 (Ala. 1988).

Birmingham News Co. v. Birmingham Printing Co., 209 Ala. 403, 96 So. 336 (1923).

Goldfield v. Brewbaker Motors, 36 Ala. App. 152, 54 So. 2d 797 (1951), cert. denied, 256 Ala. 383, 54 So. 2d 800.

West's Key Number Digest, Labor and Employment ☞3063 to 3072; Principal and Agent ☞163 to 176.

Am. Jur. 2d, Agency §§ 160 to 186.

A.L.R. Library

Manner and sufficiency of pleading agency in contract action, 45 A.L.R.2d 583.

Deviation by carrier in transportation of property, 33 A.L.R.2d 145.

**APJI 3.09 JOINT VENTURE—DEFINITION
AND RULE OF LIABILITY [PL]**

Plaintiff (name of plaintiff) says that (he/she) was harmed by defendant's (name of defendant claimed to be directly responsible for the harm) (insert tort theory, e.g., negligence). (He/she) also says all defendants (names of defendants) are responsible for the harm because they were in a joint venture when the harm happened.

All members of a joint venture are responsible for harm to third persons caused by the wrongful conduct of any member of the joint venture acting within the scope of (his/her) authority.

You must decide whether a joint venture existed in this case. A joint venture exists when persons contribute their efforts, property, money, skill or knowledge to carry out a single undertaking. A joint venture can be formed by a written or oral agreement, or an agreement can be implied from their conduct.

The persons must have a community of interest in the venture, and they must have an equal right to direct and govern the venture.

Notes on Use

Use this instruction to explain liability between members of a joint venture and to define a joint venture.

The cases generally state the elements of a joint venture; however, the cases also state that a joint venture may exist even if not all elements are present. For this reason, the instruction does not list the elements that plaintiff must prove. But, the cases are clear that the plaintiff must prove that the defendants have a community of interest and an equal right to control the venture.

When a joint venture is established, it is governed by the law of partnerships. *Carlton v. Alabama Dairy Queen, Inc.*, 529 So. 2d 921 (Ala. 1988).

References

Flowers v. Pope, 937 So. 2d 61, 24 I.E.R. Cas. (BNA) 319 (Ala. 2006).

Charles J. Arndt, Inc. v. City of Birmingham, 547 So. 2d 397 (Ala. 1989).

Carlton v. Alabama Dairy Queen, Inc., 529 So. 2d 921 (Ala. 1988).

Martinson v. Cagle, 454 So. 2d 1383 (Ala. 1984).

Moore v. Merchants & Planters Bank, 434 So. 2d 751 (Ala. 1983).

Shannon v. Hollingsworth, 291 Ala. 159, 279 So. 2d 428 (1973).

Underwood v. Holy Name of Jesus Hospital, 289 Ala. 216, 266 So.2d 773 (Ala. 1972).

Wilson v. Southside Shopping Center, Inc, 280 Ala. 615, 197 So. 2d 267 (1967).

Saunders v. McDonough, 191 Ala. 119, 67 So. 591 (1914).

Kim v. Chamberlain, 504 So. 2d 1213 (Ala. Civ. App. 1987).

Great Atlantic & Pacific Tea Co. v. Gilley, 28 Ala. App. 360, 184 So. 286 (1938).

Carboneau v. Peterson, 1 Wash. 2d 347, 375-76, 95 P.2d 1043 (1939). “The term ‘community of interest’ as applied to the relation of joint adventure, means an interest common to both parties, that is, a mixture or identity of interest in a venture in which each and all are reciprocally concerned and from which each and all derive a material benefit and sustain a mutual responsibility.”

West’s Key Number Digest, Joint Ventures ⇨1 to 4, 7 and 27 to 28, 32; Partnership ⇨174.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 14.01 (5th ed. 2010).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 37.05 (5th ed. 2010) (loaned servant doctrine).

Am. Jur. 2d, Joint Adventures §§ 1 to 6, 8, 34 to 36.

APJI 3.09

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W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 72 (5th ed. 1984).

A.L.R. Library

Corporation's power to enter into partnership or joint venture, 60 A.L.R.2d 917.

Rights in profits earned by partnership or joint adventure after death or dissolution, 55 A.L.R.2d 1391.

Partnership or joint venture matters as subject of declaratory judgment, 32 A.L.R.2d 970.

Appointment of receiver in proceedings arising out of dissolution of partnership or joint adventure, otherwise than by death of partner or at instance of creditor, 23 A.L.R.2d 583.

Federal Tort Claims Act, 1 A.L.R.2d 222.

**APJI 3.10 INDEPENDENT CONTRACTOR—
DEFINITION [PL]**

An independent contractor does work according to (his/her/its) own methods. The person who hires an independent contractor has the right to specify the result but does not have the right to control how the independent contractor does the work.

Notes on Use

Use this instruction to define independent contractor. The instruction on the rule of liability for an independent contractor is APJI 3.11.

References

Black Belt Wood Co., Inc. v. Sessions, 514 So. 2d 1249 (Ala. 1986).

Lowe v. Poole, 235 Ala. 441, 179 So. 536 (1938).

Ex parte Board of School Com'rs of Mobile County, 235 Ala. 82, 178 So. 63 (1937).

W.P. Brown & Sons Lumber Co. v. Crossley, 230 Ala. 403, 161 So. 536 (1935).

Martin v. Republic Steel Co., 226 Ala. 209, 146 So. 276 (1933).

Warren Webster & Co. v. Zac Smith Stationery Co., 222 Ala. 41, 130 So. 545 (1930).

Republic Iron & Steel Co. v. McLaughlin, 200 Ala. 204, 75 So. 962 (1917).

Caldwell v. Atlanta, B. & A.R. Co., 161 Ala. 395, 49 So. 674 (1909).

Alabama Western R. Co. v. Talley-Bates Const. Co., 162 Ala. 396, 50 So. 341 (1909).

Daves v. Rain, 28 Ala. App. 54, 178 So. 59 (1937).

West's Key Number Digest, Labor and Employment ☞3125.

Am. Jur. 2d, Independent Contractors §§ 1, 2.

A.L.R. Library

House-to-house salesman or canvasser as independent contractor or employee, for purposes of respondeat superior, 98 A.L.R.2d 335.

Advertising agency as agent of advertising medium or of advertiser, 53 A.L.R.2d 1139.

Route driver or salesman as independent contractor or employee of merchandise producer or processor, for purposes of respondeat superior doctrine, 53 A.L.R.2d 183.

Taxicab driver as employee of owner of cab, or independent contractor, within social security and unemployment insurance statutes, 10 A.L.R.2d 369.

**APJI 3.11 INDEPENDENT CONTRACTOR—
RULE OF LIABILITY [PL]**

Plaintiff (name of plaintiff) says (he/she) was harmed by (name of agent/servant/employee) (insert tort theory, e.g. negligence).

(Name of plaintiff) also says that defendant (name of defendant) is responsible for the harm because (name of agent/servant/employee) was acting as (name of defendant)'s (agent/servant/employee (insert other relationship, e.g. "partner")) when (insert tort theory) happened.

Defendant (name of defendant) says that (he/she/it) is not responsible for the harm because (name of agent/servant/employee) was not (its/his/her) (agent/servant/employee) but (he/she/it) was an independent contractor.

If (name of agent/servant/employee) was an independent contractor, (name of defendant) is not responsible for (name of plaintiff)'s harm.

You must decide from the evidence whether (name of agent/servant/employee) was an (agent/servant/employee) or whether (he/she/it) was an independent contractor. Whether (name of agent/servant/employee) is (name of defendant)'s (agent/servant/employee) depends on whether (name of defendant) had the exclusive right to control how the work was done; it makes no difference if (name of defendant) exercised that right. When deciding this question, you can consider, among other things, the following:

1. Any direct evidence that shows (name of defendant) had the right to control how the work was done;
2. The way (name of agent/servant/employee) was paid for the work;
3. Whether (name of defendant) furnished equipment or tools to (name of agent/servant/employee);

4. Whether (name of defendant) had the right to terminate (name of agent/servant/employee)’s employment;

5. Whether (name of defendant) had the right to direct how the work was to be done or whether (name of agent/servant/employee) had the exclusive right of control over the details of how the work was to be done.

(Name of defendant) is responsible for (name of plaintiff)’s harm if (name of plaintiff) proves to your reasonable satisfaction from the evidence all of the following:

1. That (name of agent/servant/employee) was (name of defendant)’s (agent/servant/employee);

2. That (name of agent/servant/employee)’s (insert tort theory) caused (name of plaintiff)’s harm;

3. That (name of agent/servant/employee) acted within the scope of (his/her) (agency/employment/(insert other relationship)) when (he/she) caused (name of plaintiff)’s harm; and,

[If (name of plaintiff) proves this, (name of defendant) is responsible for (name of plaintiff)’s harm].

Notes on Use

Use this instruction in most cases when the defendant relies on the defense that the claimed agent was an independent contractor.

However, there are situations when the instruction should not be used. When, for instance, the defendant’s duties are non-delegable, a defendant is responsible for the negligent acts of an independent contractor. *General Finance Corp. v. Smith*, 505 So. 2d 1045, 3 U.C.C. Rep. Serv. 2d 1278 (Ala. 1987) (repossession of automobile by independent contractor). Another exception to the general rule is when the work is unusually dangerous, etc. *Williams v. Tennessee River Pulp and Paper Co.*, 442 So. 2d 20 (Ala. 1983); *Thomas v. Saulsbury & Co.*, 212 Ala. 245, 102 So. 115 (1924). The committee does not attempt to set out all the exceptions to the

general rule. The user should consult the relevant case authority to determine when the instruction is appropriate.

The distinguishing characteristics between the relation of an independent contractor and that of a servant are determined by whether the person for whom he is working has control over the means and agencies by which the result is produced. In line with this test is the rule that he is deemed the master who has the supreme choice, control, and direction of the servant and whose will the servant represents, not merely in the ultimate result of his work, but in all its details. For a person to be a servant, the other party must retain the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done, as he has a reserved control or direction of the work.

References

Stovall v. Universal Const. Co., Inc., 893 So. 2d 1090 (Ala. 2004).

Dickinson v. City of Huntsville, 822 So. 2d 411, 18 I.E.R. Cas. (BNA) 84 (Ala. 2001).

Tyson Foods, Inc. v. Stevens, 783 So. 2d 804 (Ala. 2000).

Martin By and Through Martin v. Goodies Distribution, 695 So. 2d 1175 (Ala. 1997).

Shaw v. C.B. & E., Inc., 630 So. 2d 401 (Ala. 1993).

Ex parte Curry, 607 So. 2d 230 (Ala. 1992).

General Finance Corp. v. Smith, 505 So. 2d 1045, 3 U.C.C. Rep. Serv. 2d 1278 (Ala. 1987).

Williams v. Tennessee River Pulp and Paper Co., 442 So. 2d 20 (Ala. 1983).

Hodges & Co. v. Albrecht, 288 Ala. 281, 259 So. 2d 829 (1972).

Solmica of Gulf Coast, Inc. v. Braggs, 285 Ala. 396, 232 So. 2d 638 (1970).

Moore-Handley Hardware Co. v. Williams, 238 Ala. 189, 189 So. 757 (1939). The test to determine whether the relationship between a workman and those for whom he is rendering service is

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employee-employer or independent contractor is well settled in Alabama. It is the reserved right of control rather than its actual exercise that furnishes the true test of the relationship between the parties.

Greenwald v. Russell, 233 Ala. 502, 172 So. 895 (1937).

General Exchange Ins. Corp. v. Findlay, 219 Ala. 193, 121 So. 710 (1929).

Aldrich v. Tyler Grocery Co., 206 Ala. 138, 89 So. 289 (1921).

Republic Iron & Steel Co. v. McLaughlin, 200 Ala. 204, 75 So. 962 (1917).

Davis-Day Timber Co., Inc. v. Gentry, 54 Ala. App. 385, 309 So. 2d 97 (Civ. App. 1975).

West's Key Number Digest, Labor and Employment ¶3125, 3136 to 3139.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 1.02[4] (5th ed. 2010).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 37.04[1] (5th ed. 2010).

W. Page Keeton, et al., Prosser and Keeton on The Law of Torts §§ 63, 71, 104A (5th ed. 1984).

A.L.R. Library

Liability of owner or occupant of premises for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 14 A.L.R.4th 913.

Newspaper boy or other news carrier as independent contractor or employee for purposes of respondeat superior, 55 A.L.R.3d 1216.

Liability of owner, occupant, or operator of premises or machinery or equipment for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 69 A.L.R.2d 160.

Independent contractor rule as applicable to injury or death of third person as result of excavation and refill work, 33 A.L.R.2d 7.

General contractor's liability for injuries to employees of other

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contractors on the project, 20 A.L.R.2d 868.

Chapter 4

Animals [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 4.00 Introduction [PL]
- APJI 4.01 Dog Bite or Other Injury While on Owner’s Premises—Ala. Code §§ 3-6-1 to 3 (1975) (West’s Alabama Code) [PL]
- APJI 4.02 Harm Caused by Dangerous Domestic Animal—Common Law Claim for Negligence [PL]
- APJI 4.03 Harm Caused by Dangerous Domestic Animal—Common Law Claim for Negligence—Proof of Breed Propensity Offered [PL]
- APJI 4.04 Landlord’s Duty—Vicious Dog [PL]
- APJI 4.05 Justification—Killing Vicious Domestic Animal [PL]
- APJI 4.06 Motorist—Stock Owner’s Liability—Ala. Code § 3-5-3 (1975) (West’s Alabama Code) [PL]

Title of Instruction	Date Approved	Prior Instruction Number
4.00 Introduction [PL]	9/5/14	New
4.01 Dog Bite Or Other Injury While On Owner’s Premises—Ala. Code §§ 3-6-1 to 3 (1975) (West’s Alabama Code). [PL]	9/5/14	4.01, 4.02, 4.03
4.02 Harm Caused By Dangerous Domestic Animal—Common Law Claim For Negligence [PL]	9/5/14	4.04-4.10
4.03 Harm Caused By Dangerous Domestic Animal Common Law Claim For Negligence Proof Of Breed Propensity Offered [PL]	9/5/14	4.13
4.04 Landlord’s Duty—Vicious Dog (PL)	9/5/14	4.14

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Title of Instruction	Date Approved	Prior Instruction Number
4.05 Justification—Killing Vicious Domestic Animal [PL]	9/5/14	4.11
4.06 Motorist—Stock Owner’s Liability, Ala. Code § 3-5-3 (1975) (West’s Alabama Code) [PL]	9/5/14	4.12

APJI 4.00 INTRODUCTION [PL]

This chapter does not cover all situations when a domestic or wild animal harms a person or property: rather, it covers the more common events that give rise to claims for personal injury.

Personal injury and property damage caused by wild or domestic animals is controlled by common law, statutory law, county resolutions that adopt an Alabama statute (see, e. g., Ala. Code § 3-1-5 (b) (1975) (West's Alabama Code)), and municipal ordinances. The user should consult the sources listed in the references to determine the law that applies to the claim.

Approved September 5, 2014

References

2 Ally Windsor Howell, Ala. Pers. Inj. & Torts § 10:22 (2016 ed.).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law Chapter 12 (5th ed. 2010).

W. Page Keeton, et al., Prosser and Keeton on Torts §§ 76, 79 (5th ed. 1984).

Clay T. Rossi, The Current State of Alabama Dog-Bite Law: Breeding Confusion in the Law, 72 Ala. Law. 216 (May, 2011).

Barry N. McCrary, Comment: Contributory Negligence as a Defense Under Dog-Bite Statutes, 17 Ala. L. Rev. 154 (Fall 1964).

Ala. Code §§ 3-3-1 to 6 (1975) (West's Alabama Code).

Ala. Code §§ 3-5-1, 3, 14 (1975) (West's Alabama Code).

Ala. Code §§ 3-6-1 to 4 (1975) (West's Alabama Code).

Ala. Code §§ 3-7A-1 to 5, 14 (1975) (West's Alabama Code) (Rabies).

Ala. Code § 6-5-337 (1975) (West's Alabama Code) (Equine Activities Liability Protection Act).

APJI 4.00**ALABAMA PATTERN JURY INSTRUCTIONS**

Am. Jur. 2d Animals §§ 62 to 66 (Wild animals).

Am. Jur. 2d Animals §§ 67 to 84 (Domestic animals).

Restatement (Second) of Torts § 509 (1981).

**APJI 4.01 DOG BITE OR OTHER INJURY
WHILE ON OWNER'S PREMISES—
ALA. CODE §§ 3-6-1 TO 3 (1975)
(WEST'S ALABAMA CODE) [PL]**

Plaintiff (name of plaintiff) says (he/she) was harmed by defendant's (name of defendant) dog. (Name of plaintiff) says (describe the event and the harm).

(Name of defendant) says ((name of plaintiff) (was not lawfully on the property/ (name of plaintiff) provoked the dog).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (he/she) was lawfully on property (name of defendant) owned or controlled, or (he/she) had just been on property (name of defendant) owned or controlled;

2. That the dog caused (name of plaintiff)'s harm while (he/she) was on the property or the dog chased (name of plaintiff) from the property where (he/she) had just been.

If (name of plaintiff) proved these things you must find for (him/her), and then you must determine how much money to award (him/her) for the harm.

If (name of plaintiff) did not prove these things, you must find for (name of defendant).

Person lawfully on property: Ala. Code § 3-6-2 (1975)
(West's Alabama Code).

(Name of plaintiff) was lawfully on (name of defendant)'s property if (he/she) was on the property:

(Doing a job required by the law of Alabama or the United States.)

APJI 4.01**ALABAMA PATTERN JURY INSTRUCTIONS**

(Doing a job required by United States postal laws or regulations.)

(Delivering milk.)

(Making repairs to any public utility or public utility service to the property.)

(At the express or implied invitation of the owner or renter.)

Mitigation of damages (Ala. Code § 3-6-3 (1975) (West’s Alabama Code)).

(Name of defendant) says (he/she) neither knew nor had reason to know the dog had vicious, dangerous, or mischievous tendencies. If (he/she) proves this to your reasonable satisfaction from the evidence, (name of plaintiff) can recover only the actual expenses that (he/she) had as a result of the harm.

Contributory negligence—Provocation.

(Name of defendant) says (name of plaintiff) provoked the dog by (state how the dog was provoked). If (name of defendant) proved to your reasonable satisfaction from the evidence that (name of plaintiff) provoked the dog, you must find for (name of defendant).

(Name of plaintiff) provoked the dog if (he/she) deliberately did something that angered or annoyed the dog.

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Notes on Use

Use this instruction when a person is bitten or injured by a dog on the owner’s premises or the dog bites or injures the person while the dog chases the person from the premises.

The instruction combines APJI 4.01, 4.02, and 4.03 (3d. ed. 2013). APJI 4.02 defines vicious tendency or propensity.

References

Ala. Code §§ 3-6-1 to 3 (1975) (West's Alabama Code).

Ala. Code § 3-6-1 (1975) (West's Alabama Code) states:

If any dog shall, without provocation, bite or injure any person who is at the time at a place where he or she has a legal right to be, the owner of such dog shall be liable in damages to the person so bitten or injured, but such liability shall arise only when the person so bitten or injured is upon property owned or controlled by the owner of such dog at the time such bite or injury occurs or when such person has been immediately prior to such time on such property and has been pursued therefrom by such dog.

McCaster v. Jackson, 833 So. 2d 36 (Ala. 2002).

Humphries v. Rice, 600 So. 2d 975 (Ala. 1992).

King v. Breen, 560 So. 2d 186 (Ala. 1990).

Rucker v. Goldstein, 497 So. 2d 491 (Ala. 1986).

West's Key Number Digest, Animals ☞66.5(2).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 12.02 (5th ed. 2010).

Jenelle Mims Marsh, Alabama Law of Damages § 36:15 (6th ed. 2012).

Am. Jur. 2d, Animals §§ 94 to 95, 98 to 105.

Clay T. Rossi, The Current State of Alabama Dog-Bite Law: Breeding Confusion in The Law, 72 Ala. Law. 216 (May, 2011).

A.L.R. Library

Liability of owner or operator of business premises for injuries to patron caused by insect or small animal, 48 A.L.R.3d 1257.

Liability of landlord to tenant or member of tenant's family, for injury by animal or insect, 67 A.L.R.2d 1005.

Comment Note.—Contributory negligence as a defense to a cause of action based upon violation of statute, 10 A.L.R.2d 853.

Liability for injury inflicted by horse, dog, or other domestic

APJI 4.01**ALABAMA PATTERN JURY INSTRUCTIONS**

animal exhibited at show, 68 A.L.R.5th 599.

**APJI 4.02 HARM CAUSED BY DANGEROUS
DOMESTIC ANIMAL—COMMON
LAW CLAIM FOR NEGLIGENCE [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) owned or kept a dangerous (dog). (Name of plaintiff) further says (name of defendant) knew or had reason to know the (dog) was dangerous but (he/she) negligently did not safely and securely keep the (dog) to prevent it from causing harm. As a result, (name of plaintiff) says (describe event) and caused (him/her) harm.

To recover (name of plaintiff) must prove to your reasonable satisfaction from the evidence all the following:

1. That (name of defendant) owned or kept the (dog);
2. That the (dog) had vicious tendencies;

A (dog) has vicious or mischievous tendencies if it has a tendency to do any act which, in a given situation, might endanger a person's safety or property.

(If the animal acts solely from mischievousness or playfulness but has a tendency to do a dangerous or harmful act, it has a vicious tendency.)

3. That (name of defendant) knew or had reason to know about the (dog's) vicious tendencies;

(Name of plaintiff) does not have to prove that (name of defendant) knew or had reason to know about the exact tendencies (name of plaintiff) says the (dog) showed in this case. But, (name of plaintiff) must prove (name of defendant) knew about facts from which (he/she) could have reasonably concluded the (dog) was likely to the act in the way (name of plaintiff) says it did in this case.

4. That (name of defendant)'s conduct was negligent because (state why plaintiff says defendant was negligent); and,

(Name of defendant) was negligent if (he/she) did something that a reasonably prudent (owner/keeper) would not have done in a similar situation, or (he/she) failed to do something that a reasonably prudent (owner/keeper) would have done in a similar situation.

5. That (name of defendant)'s negligence was a cause of (name of plaintiff)'s harm.

If (name of plaintiff) proved all the above you must find for (him/her), and then you must determine the amount of money to award (him/her) for the harm. If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved September 5, 2014

Notes on Use

Use this instruction when the plaintiff's claim is based on common law and is not based on the dangerous propensity of a certain breed. The instruction can be used in any case that a domestic animal caused harm, and a dog is used only for example. The instruction can be modified when the plaintiff claims wanton conduct.

Use APJI 4.04 if the common law claim is based on a breed of dog's dangerous propensity. *Humphries v. Rice*, 600 So. 2d 975 (Ala. 1992).

A plaintiff can claim the animal had individual dangerous propensities and the breed has natural dangerous propensities. See, e. g., *Edgar v. Riley ex rel. Riley*, 725 So. 2d 982 (Ala. Civ. App. 1998); *Wright ex rel. Wright v. Calvin Reid Const. Co., Inc.*, 723 So. 2d 55 (Ala. Civ. App. 1997). However, an instruction that includes both concepts is cumbersome.

The plaintiff's status as invitee, licensee, or trespasser can determine the duty owed the plaintiff. See, e.g., APJI 31.09.

References

Armstrong v. Hill, 290 So. 3d 411 (Ala. 2019).

Williams v. Hill, 658 So. 2d 381 (Ala. 1995).

King v. Breen, 560 So. 2d 186 (Ala. 1990).

Rucker v. Goldstein, 497 So. 2d 491 (Ala. 1986).

Kent v. Sims, 460 So. 2d 144 (Ala. 1984).

White v. Law, 454 So. 2d 515 (Ala. 1984).

Owen v. Hampson, 258 Ala. 228, 62 So. 2d 245 (1952).

Edgar v. Riley ex rel. Riley, 725 So. 2d 982 (Ala. Civ. App. 1998).

Molinari v. Tuskegee University, 339 F. Supp. 2d 1293, 192 Ed. Law Rep. 858 (M.D. Ala. 2004) (cow).

West's Key Number Digest, Animals ¶20, 67–70, 72, 73.

See the references in APJI 4.00.

**APJI 4.03 HARM CAUSED BY DANGEROUS
DOMESTIC ANIMAL—COMMON
LAW CLAIM FOR NEGLIGENCE—
PROOF OF BREED PROPENSITY
OFFERED [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) owned or kept a dangerous dog and that breed of dog (state breed) has known dangerous tendencies. (Name of plaintiff) further says (name of defendant) (negligently/wantonly) did not safely and securely keep the (dog) to prevent it from causing harm. As a result, (name of plaintiff) says (describe event) and caused (him/her) harm.

The owner or keeper of a domestic animal is presumed to know the tendencies of the breed of animal (he/she/it) owns or keeps. For this reason, (name of plaintiff) does not have to prove (name of defendant) knew or should have known that (the dog) had vicious tendencies. However, (name of plaintiff) must prove that a (dog) of that breed has natural vicious tendencies, and (he/she) must also prove that in this case the (dog) acted in accordance with (his/her) natural tendencies.

To recover (name of plaintiff) must prove to your reasonable satisfaction from the evidence all the following:

1. That (name of defendant) owned or kept (state breed of dog);
2. That (state breed of dog) had natural vicious tendencies (state the tendencies);

A (dog) has vicious or mischievous tendencies if it has a tendency to do any act which, in a given situation, might endanger a person's safety or property.

(If the animal acts solely from mischievousness or playfulness but has a tendency to do a dangerous or harmful act, it has a vicious tendency.)

3. That the dog acted in accordance with its natural tendencies when it (describe the event);

4. That (name of defendant)'s conduct was negligent because (state why plaintiff says defendant was negligent); and,

(Name of defendant) was negligent if (he/she/it) did something that a reasonably prudent (owner/keeper) would not have done in a similar situation, or (he/she/it) failed to do something that a reasonably prudent (owner/keeper) would have done in a similar situation.

5. That (name of defendant)'s negligence was a cause of (name of plaintiff)'s harm.

If (name of plaintiff) proved all the above you must find for (him/her), and then you must determine the amount of money to award (him/her) for the harm. If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved September 5, 2014

Notes on Use

Use this instruction when the plaintiff's claim is based on common law and is based on the dangerous propensity of a certain breed. The instruction can be modified when the plaintiff claims wanton conduct.

This instruction is based on *Humphries v. Rice*, 600 So. 2d 975 (Ala. 1992) and it applies traditional common law proof analysis. The user may wish to read the article written by Clay T. Rossi referenced below. The Alabama appellate courts have addressed *Humphries*, but they have not considered the issues raised in the Rossi article.

See APJI 4.02 Notes on Use.

References

McCaster v. Jackson, 833 So. 2d 36 (Ala. 2002).

APJI 4.03

ALABAMA PATTERN JURY INSTRUCTIONS

Williams v. Hill, 658 So. 2d 381 (Ala. 1995).

Gentle v. Pine Valley Apartments, 631 So. 2d 928 (Ala. 1994).

Humphries v. Rice, 600 So. 2d 975 (Ala. 1992).

Coley By and Through Coley v. Hendrix, 508 So. 2d 216 (Ala. 1987) (Jones, J., dissenting).

Edgar v. Riley ex rel. Riley, 725 So. 2d 982 (Ala. Civ. App. 1998).

Wright ex rel. Wright v. Calvin Reid Const. Co., Inc., 723 So. 2d 55 (Ala. Civ. App. 1997).

West's Key Number Digest, Animals ¶66.1, 66.2, 66.5(1), 66.5(7).

Clay T. Rossi, The Current State of Alabama Dog-Bite Law: Breeding Confusion in the Law, 72 Ala. Law. 216 (May, 2011).

See APJI 4.00 references.

**APJI 4.04 LANDLORD’S DUTY—VICIOUS DOG
[PL]**

If a tenant’s vicious (dog/animal) is in the common area of an apartment complex, this is a dangerous condition. If the landlord knows or has reason to know about the (dog’s/animal’s) vicious tendencies, the landlord must use reasonable care to prevent it from harming others.

Approved September 5, 2014

Notes on Use

Use this instruction in cases where one tenant is injured by another tenant’s dog (animal) on the landlord’s premises.

References

Gentle v. Pine Valley Apartments, 631 So. 2d 928 (Ala. 1994). The plaintiff failed to present substantial evidence that the mixed-breed dog had natural vicious tendencies. The Court did not address whether the dog can constitute an artificial condition on land.

King v. Breen, 560 So. 2d 186 (Ala. 1990). Among other holdings, the Court held the plaintiff can pursue a *Tolbert v. Gulsby*, 333 So. 2d 129 (Ala. 1976) premises liability claim against the landowner who kept a dog chained to a car and neglected to properly care for the dog.

Berg v. Nguyen, 201 So. 3d 1185 (Ala. Civ. App. 2016).

See, APJI 31.09 (3d ed. 2013).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 12.01 (4th ed. 2010).

West’s Key Number Digest, Animals ⇌72.

Am. Jur. 2d Animals § 73.

APJI 4.05 JUSTIFICATION—KILLING VICIOUS DOMESTIC ANIMAL [PL]

(Name of defendant) says (he/she) was justified when (he/she) killed (name of plaintiff)'s (type of animal) because (state the grounds for justification).

(Name of defendant) is not responsible for killing the (animal) if (he/she) reasonably satisfies you from the evidence that:

1. (Name of defendant) (a member of (his/her) family) was on (his/her/the) (property/ public highway); and,

2. (He/she/a member of the family) was put in danger because the (animal) was attacking (him/her/a member of the family).

If (name of defendant) proved both these things you must find for (him/her).

Approved September 5, 2014

Notes on Use

This instruction states the common law rule of justification when a person is attacked by a vicious animal.

References

Allen v. Camp, 14 Ala. App. 341, 70 So. 290 (1915).

Russell v. Barrow, 7 Port. 106, 1838 WL 1314 (Ala. 1838).

West's Key Number Digest, Animals ☞73.

A.L.R. Library

Liability for statement or publication charging plaintiff with killing of, cruelty to, or inhumane treatment of animals, 69 A.L.R. 5th 645.

**APJI 4.06 MOTORIST—STOCK OWNER'S
LIABILITY—ALA. CODE § 3-5-3 (1975)
(WEST'S ALABAMA CODE) [PL]**

Plaintiff (name of plaintiff) says (he/she) was harmed when the (kind of motor vehicle) (he/she) was driving hit a (type of livestock) on the public roadway. (Name of plaintiff) further says defendant (name of defendant) owned the (livestock).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That the (livestock) was on a public roadway;
2. That (name of defendant) owned the (livestock);
3. That (name of defendant) willfully or knowingly put or placed the (livestock) on the public roadway; and,
4. (Name of defendant)'s knowing or willful conduct was a cause of (name of plaintiff)'s harm.

If (name of plaintiff) proved all these things you must find for (him/her), and then you must determine what amount of money to award (him/her) for the harm.

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved September 5, 2014

Notes on Use

Use this instruction in any case when the plaintiff sues for personal injury or property damage because he or she hit livestock on a public roadway and the claim is based on Ala. Code § 3-5-3 (1975) (West's Alabama Code).

If the collision happened within a municipality's police jurisdiction, a municipal ordinance may provide plaintiff a remedy if he

or she cannot recover under § 3-5-3. See, Ala. Code § 3-5-14(a) (1975) (West's Alabama Code); *Wilkins v. Johnson*, 595 So. 2d 466 (Ala. 1992).

References

Ala. Code § 3-5-1 (1975) (West's Alabama Code) states:

“The term ‘livestock’ or ‘animal . . .’ shall be held to be limited to and refer to equine or equidae, cows, calves, yearlings, bulls, oxen, sheep, goats, lambs, kids, hogs, shoats, and pigs.”

Ala. Code § 3-5-3 (1975) (West's Alabama Code) states:

(a) The owner of such livestock or animal being or running at large upon the premises of another or upon the public lands, roads, highways or streets in the State of Alabama shall be liable for all damages done to crops, shade or fruit trees or ornamental shrubs and flowers of any person, to be recovered before any court of competent jurisdiction; **provided, that the owner of any stock or animal shall not be liable for any damages to any motor vehicle or any occupant thereof suffered, caused by or resulting from a collision with such stock or other animal, unless it be proven that such owner knowingly or willfully put or placed such stock upon such public highway, road or street where such damages were occasioned.** (emphasis supplied)

Ala. Code § 3-5-14 (1975) (West's Alabama Code) (grants municipalities authority to enact ordinances to prevent livestock from running at large within municipal limits).

Hayes v. Henley, 84 So. 3d 60 (Ala. 2011).

Lollar v. Poe, 622 So. 2d 902 (Ala. 1993).

Wilkins v. Johnson, 595 So. 2d 466 (Ala. 1992). Municipality can enact livestock ordinance that extends to its police jurisdiction.

Carpenter v. McDonald, 495 So. 2d 640 (Ala. 1986).

Scott v. Dunn, 419 So. 2d 1340 (Ala. 1982). Section 3-5-3 is constitutional.

Brewer v. Atkinson, 262 So. 3d 663 (Ala. Civ. App. 2018).

McPherson v. Gross, 399 So. 2d 301 (Ala. Civ. App. 1981). Section 3-5-3 is constitutional.

Ex parte Jackson, 378 So. 2d 1112 (Ala. 1979).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 12.04 (5th ed. 2010).

West's Key Number Digest, Animals ⇨48, 49, 62, 66.8.

West's Key Number Digest, Automobiles ⇨244(2.1), 289.5, 303(3).

A.L.R. Library

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 A.L.R.4th 431.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 A.L.R.4th 159.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 A.L.R.4th 132.

Chapter 5

Assault and Battery [PL]

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- APJI 5.00 Assault—Elements [PL]
- APJI 5.01 Assault and Battery, or Battery Only—Elements [PL]
- APJI 5.02 Abusive Language—Mitigation of Punitive Damages [PL]
- APJI 5.03 Justification—Ala. Code § 13A-3-23 (1975) (West’s Alabama Code) [PL]

Title of Instruction	Date Approved	Prior Instruction Number
5.00 Assault-Elements [PL]	4/11/14	5.05
5.01 Assault and Battery or Battery Only—Elements [PL]	4/11/14	5.00
5.02 Abusive Language-Mitigation of Punitive Damages [PL]	4/11/14	5.01
5.03 Justification—Ala. Code § 13A-3-23 (1975) (West’s Alabama Code) [PL]	4/11/14	5.02

APJI 5.00 ASSAULT—ELEMENTS [PL]

Plaintiff (name of plaintiff) says defendant (name of defendant) (describe defendant)'s conduct. This is a claim for assault.

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. (Name of defendant) threatened to touch (name of plaintiff);
2. (Name of defendant) made the threat in an angry or rude manner;
3. (Name of defendant) had the apparent ability to carry out the threat; and,
4. Under the circumstances, (name of plaintiff) had a well-founded fear that (name of defendant) would immediately carry out the threat.

(Name of plaintiff) does not have to prove that (name of defendant) touched (name of plaintiff). However, words alone, no matter how abusive, are not an assault.

If (name of plaintiff) proved all the above you must find for (him/her), and then you must determine what amount of money to award (name of plaintiff). If (name of plaintiff) did not prove all the above, you must find for (name of defendant).

Approved April 11, 2014

Notes on Use

Use this instruction when the plaintiff sues for assault only.

The former instruction, APJI 5.05 (3d ed. 2013) is the common law definition of assault. *O'Rear v. B.H.*, 69 So. 3d 106, 117 (Ala. 2011), abrogated on other grounds, *Ex parte Vanderwall*, 201 So.

3d 525 (Ala. 2015). Assault was discussed in *Whitlow v. Bruno's Inc.*, 567 So. 2d 1235, 1239 (Ala. 1990): "Blackstone's definition of an assault is: 'An attempt or offer to beat another, without touching him; as if one lifts up his cane or his fist in a threatening manner; or strikes at him but misses him.' As observed by Gaynor, J., in *Prince v. Ridge*, 32 Misc. 666, 66 N.Y.S. 454 (Sup 1900), **this is not a complete definition, but is sufficient to serve as an illustration of the nature of an assault which will support an action.**" A successful assault becomes a battery, which consists of the touching of another in a hostile manner. *Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986).

Two United States district courts have stated that the words or action create a reasonable fear of imminent contact, as opposed to a "well-founded" fear of imminent contact. *Morrow v. Auburn University at Montgomery*, 973 F. Supp. 1392, 1409, 121 Ed. Law Rep. 107 (M.D. Ala. 1997); *Brassfield v. Jack McLendon Furniture, Inc.*, 953 F. Supp. 1438, 1459 (M.D. Ala. 1996). Professor Dobbs comments that "in one sense, there is no such thing as a 'words alone' case." Dan B. Dobbs, et al, *The Law of Torts* § 39 p. 100 (2d ed. 2011).

Assault deals more with the apprehension created in the mind of the plaintiff than the defendant's intentions. *Whitlow*. Apprehension "usually shows no more than fear of future misfortune or evil." *Johnston v. Johnston*, 279 Ala. 246, 247, 184 So. 2d 153 (1966). *Johnston* is a divorce case, and it contrasts the phrases "reasonable apprehension of violence" and "reasonably convinced of violence."

References

O'Rear v. B.H., 69 So. 3d 106 (Ala. 2011), abrogated on other grounds, *Ex parte Vanderwall*, 201 So. 3d 525 (Ala. 2015).

Wright v. Wright, 654 So. 2d 542, 544 (Ala. 1995).

Allen v. Walker, 569 So. 2d 350 (Ala. 1990).

Whitlow v. Bruno's, Inc., 567 So. 2d 1235, 1239 (Ala. 1990).

Surrency v. Harbison, 489 So. 2d 1097, 1104 (Ala. 1986).

Ex parte Hammett, 259 Ala. 240, 242, 66 So. 2d 600 (1953). "Mere words, however abusive, not defamatory and unconnected with an assault cannot form the basis of a cause of action."

Harrison v. Mitchell, 391 So. 2d 1038 (Ala. Civ. App. 1980).

APJI 5.00

ALABAMA PATTERN JURY INSTRUCTIONS

Western Union Telegraph Co. v. Hill, 25 Ala. App. 540, 541–42, 150 So. 709, 710 (1933).

Singer Sewing Mach. Co. v. Methvin, 184 Ala. 554, 561, 63 So. 997, 999 (1913).

Morrow v. Auburn University at Montgomery, 973 F. Supp. 1392, 1409, 121 Ed. Law Rep. 107 (M.D. Ala. 1997).

Brassfield v. Jack McLendon Furniture, Inc., 953 F. Supp. 1438, 1459 (M.D. Ala. 1996).

West’s Key Number Digest, Assault and Battery ☞2.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 28.01 (5th ed. 2010).

Dan B. Dobbs, et al, The Law of Torts § 39 (2d ed. 2011).

**APJI 5.01 ASSAULT AND BATTERY, OR
BATTERY ONLY—ELEMENTS [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) (describe the event). (Name of plaintiff) further says (name of defendant)’s conduct caused (name of plaintiff) harm (describe the harm). This is a claim for (assault and battery/battery).

To recover on this claim, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. (Name of defendant) (describe what defendant did, e.g., touched, shot, hit, the plaintiff);
2. (Name of defendant) intended to (describe the conduct from element 1); and,
3. (Name of defendant) did this in a harmful or offensive manner. The word “offensive” means the conduct is likely to offend a reasonable person.

(Name of plaintiff) does not have to prove that (name of defendant) intended to harm (name of plaintiff), and (he/she) does not have to prove actual injury to (his/her) body.

If (name of plaintiff) proved all these things, you must find for (him/her), and then you must determine the amount of money to award (name of plaintiff).

If (name of plaintiff) did not prove all these things (or if (name of defendant) proved (his/her) (state the affirmative defense)), you must find for (name of defendant).

Approved April 11, 2014

Notes on Use

Use this instruction in any case when plaintiff claims an assault and battery or battery only.

The plaintiff can sue for battery or assault and battery: the elements are identical. Compare, *Ex parte Atmore Community Hosp.*, 719 So. 2d 1190, 1193 (Ala. 1998) and *Harper v. Winston Cnty.*, 892 So. 2d 346, 353 (Ala. 2004). The plaintiff does not have to prove actual injury to the body. *Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986).

The word “rude” has historically been used instead of harmful. Rudeness is not a narrow concept, and it includes offensive conduct. *Turner v. State*, 41 Ala. App. 310, 131 So. 2d 428 (1961) (carnal knowledge of girl over 12 but under 16); *K.M. v. Alabama Dept. of Youth Services*, 360 F. Supp. 2d 1253 (M.D. Ala. 2005) (officer put his finger into the vagina of a juvenile detainee).

The word “harmful” means the conduct is capable of causing or able to cause harm. The word “offensive” means the conduct is likely to offend a reasonable person.

Alabama recognizes a cause of action for negligent assault and battery. *City of Birmingham v. Thompson*, 404 So. 2d 589 (Ala. 1981); *Allstate Indem. Co. v. Lewis*, 985 F. Supp. 1341 (M.D. Ala. 1997).

See 1 APJI 5.05 (3d ed. 2012) for a definition of assault.

References

Dolgencorp, LLC v. Spence, 224 So. 3d 173 (Ala. 2016).

Harper v. Winston Cnty., 892 So. 2d 346, 21 I.E.R. Cas. (BNA) 567 (Ala. 2004).

Ex parte Atmore Community Hosp., 719 So. 2d 1190, 14 I.E.R. Cas. (BNA) 181, 73 Empl. Prac. Dec. (CCH) P 45420 (Ala. 1998).

Surrency v. Harbison, 489 So. 2d 1097 (Ala. 1986).

Wood v. Cowart Enterprises, Inc., 809 So. 2d 835 (Ala. Civ. App. 2001).

Seigel v. Long, 169 Ala. 79, 82, 53 So. 753, 754 (1910).

West’s Key Number Digest, Assault and Battery ⇐2, 3.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 28.01, 28.02 (5th ed. 2010).

Am. Jur. 2d, Assault and Battery §§ 1 to 7.

Jerome A. Hoffman & William A. Schroeder, Burdens of Proof, 38 Ala. L. Rev. 31, 55 (1986).

A.L.R. Library

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 A.L.R. 5th 1.

Liability of hospital for injury caused through assault by a patient, 48 A.L.R.3d 1288.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner, 41 A.L.R.3d 1021.

Liability under Jones Act or seaworthiness doctrine for injuries caused by assault, 22 A.L.R.3d 624.

Homicide or assault as ground for disciplinary measures against attorney, 21 A.L.R.3d 887.

Civil liability of insane or other mentally disordered person for assault or battery, 77 A.L.R.2d 625.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 A.L.R.2d 806.

Assaulting, threatening, or intimidating witness as contempt of court, 52 A.L.R.2d 1297.

Liability for assault by partner or joint adventurer, 30 A.L.R.2d 859.

Liability for assault by employee in collecting debt, 22 A.L.R.2d 1227.

Doctrine of apparent authority as applicable where relationship is that of master and servant, 2 A.L.R.2d 406.

**APJI 5.02 ABUSIVE LANGUAGE—MITIGATION
OF PUNITIVE DAMAGES [PL]**

(Name of plaintiff) asks for punitive damages.

If you find that (name of plaintiff):

1. Directed obscene, abusive or offensive language toward (name of defendant); and,

2. (He/she) did so at or about the time of the assault and battery,

You may consider this but only to reduce the amount of punitive damages if you decide to award them.

Approved April 11, 2014

Notes on Use

Use this instruction when verbal abuse of the defendant by the plaintiff occurred at or about the time of an assault and battery.

References

Jones v. Bynum, 189 Ala. 677, 680, 66 So. 639, 640 (1914). “[I]f the defendant assaulted the plaintiff because of ‘words only’ used by the plaintiff to the defendant, [the jury] must find for the plaintiff.”

Mitchell v. Gambill, 140 Ala. 316, 319, 37 So. 290, 291 (1904). Opprobrious words made by a plaintiff at the time of the difficulty are admissible under the general issue; there need not be a special plea.

Empire Clothing Co. v. Hammons, 17 Ala. App. 60, 62, 81 So. 838, 840 (1919).

Ritter v. Griswold, 2 Ala. App. 618, 622, 56 So. 860, 861 (1911). That the plaintiff at some time previous to the difficulty in question made a derogatory remark about the defendant is not competent evidence because it is too indefinite and remote as to time.

ASSAULT AND BATTERY

APJI 5.02

West's Key Number Digest, Assault and Battery ⇐12, 24(3), 37.

Am. Jur. 2d, Assault and Battery § 112.

A.L.R. Library

Assaulting, threatening, or intimidating witness as contempt of court, 52 A.L.R.2d 1297.

Indecent proposal to woman as assault, 12 A.L.R.2d 971.

APJI 5.03 JUSTIFICATION—ALA. CODE § 13A-3-23 (1975) (WEST’S ALABAMA CODE) [PL]

READ NOTES ON USE

(Name of defendant) says (he/she) acted in (self-defense/in defense of (name)) and you must find for (him/her). (He/she) says (he/she) reasonably believed (state (name of plaintiff) and what defendant says plaintiff did or was about to do), and (he/she) used only the force necessary to defend (himself/herself/name of third person).

To prove this defense, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (he/she) did not bring on or provoke the difficulty with (name of plaintiff);

(1. a. The person (he/she) was defending did not bring on or provoke the difficulty with (name of plaintiff)). **Use this only when the defendant says (he/she) was defending another.**

2. (Name of defendant) reasonably believed that (name of plaintiff) was immediately going to use physical force against (him/her/name of third person); and,

3. (Name of defendant) did not use any more force than was necessary to defend (himself/herself/name of third person).

Physical force is a physical act, and it is the force one person applies against the body of another person.

RETREAT

(Name of defendant) does not have to retreat if (he/she) was not involved in any unlawful activity and (he/she) was in a place (he/she) had a right to be.

If (name of defendant) proved all the above you must find for (him/her).

Approved April 11, 2014

Notes on Use

This instruction subsumes 1 APJI 5.04 (3d ed. 2013).

This instruction applies only to the case that defendant uses physical force against the plaintiff. The trial judge must modify the instruction when the case includes the circumstances listed in Ala. Code § 13A-3-23(c) (1975) (West's Alabama Code). It must be modified if the defendant uses deadly physical force.

Use this instruction when the defendant pleads self-defense under Ala. Code § 13A-3-23 (1975) (West's Alabama Code). Subsection (d) immunizes defendants from civil liability. *Skinner v. Bevans*, 116 So. 3d 1147 (Ala. Civ. App. 2012). 2016 Ala. Acts 420 amended § 13A-3-23 and added § 13A-3-23(d)(1)-(4). These subsections establish a pretrial procedure to determine whether the defendant is immune from criminal prosecution.

The user should review several other Alabama Code sections that excuse, but do not immunize, the defendant's conduct. They are: Ala. Code §§ 13A-3-24, 13A-3-25, 13A-3-26, 13A-3-27, and 6-5-346 (1975) (West's Alabama Code). The last section is stated in 2 APJI 31.08A (3d ed. 2013). Ala. Code § 16-28A-5 (1975) (West's Alabama Code) provides immunity to school personnel who administer corporal punishment in accordance with school board policy. Ala. Code § 6-5-338 (1975) (West's Alabama Code) provides immunity to law enforcement officers in certain circumstances. Finally, the user should consider the immunity provided by Ala. Const. art. I § 14 and other privileges under Alabama law.

2014 Ala. Acts 124 immunizes state officers, agents and employees in their personal capacity under certain circumstances. The Act apparently codifies the state agent immunity doctrine restated in *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000) as extended by *Ex parte Moulton*, 116 So. 3d 1119, 295 Ed. Law Rep. 401, 34 I.E.R. Cas. (BNA) 1514 (Ala. 2013).

References

Ala. Code § 13A-3-23 (1975) (West's Alabama Code) states:

(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believes to be necessary for the purpose. A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person pursuant to subdivision (4), if the person reasonably believes that another person is:

(1) Using or about to use unlawful deadly physical force.

(2) Using or about to use physical force against an occupant of a dwelling while committing or attempting to commit a burglary of such dwelling.

(3) Committing or about to commit a kidnapping in any degree, assault in the first or second degree, burglary in any degree, robbery in any degree, forcible rape, or forcible sodomy.

(4) In the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered, a dwelling, residence, or occupied vehicle, or federally licensed nuclear power facility, or is in the process of sabotaging or attempting to sabotage a federally licensed nuclear power facility, or is attempting to remove, or has forcefully removed, a person against his or her will from any dwelling, residence, or occupied vehicle when the person has a legal right to be there, and provided that the person using the deadly physical force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring. The legal presumption that a person using deadly physical force is justified to do so pursuant to this subdivision does not apply if:

a. The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;

b. The person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used;

c. The person who uses defensive force is engaged in an

unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

d. The person against whom the defensive force is used is a law enforcement officer acting in the performance of his or her official duties.

(b) A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.

(c) Notwithstanding the provisions of subsection (a), a person is not justified in using physical force if:

(1) With intent to cause physical injury or death to another person, he or she provoked the use of unlawful physical force by such other person.

(2) He or she was the initial aggressor, except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter person nevertheless continues or threatens the use of unlawful physical force.

(3) The physical force involved was the product of a combat by agreement not specifically authorized by law.

(d)(1) A person who uses force, including deadly physical force, as justified and permitted in this section is immune from criminal prosecution and civil action for the use of such force, unless the force was determined to be unlawful.

(2) Prior to the commencement of a trial in a case in which a defense is claimed under this section, the court having jurisdiction over the case, upon motion of the defendant, shall conduct a pretrial hearing to determine whether force, including deadly force, used by the defendant was justified or whether it was unlawful under this section. During any pretrial hearing to determine immunity, the defendant must show by a preponderance of the evidence that he or she is immune from criminal prosecution.

(3) If, after a pretrial hearing under subdivision (2), the court concludes that the defendant has proven by a preponderance of the evidence that force, including deadly force, was justified,

the court shall enter an order finding the defendant immune from criminal prosecution and dismissing the criminal charges.

(4) If the defendant does not meet his or her burden of proving immunity at the pre-trial hearing, he or she may continue to pursue the defense of self-defense or defense of another person at trial. Once the issue of self-defense or defense of another person has been raised by the defendant, the state continues to bear the burden of proving beyond a reasonable doubt all of the elements of the charged conduct.

(e) A law enforcement agency may use standard procedures for investigating the use of force described in subsection (a), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force used was unlawful.

Ex parte Watters, 220 So. 3d 1093 (Ala. 2016).

Skinner v. Bevans, 116 So. 3d 1147 (Ala. Civ. App. 2012).

Malone v. State, 221 So. 3d 1153 (Ala. Crim. App. reh'g denied (Ala. Crim. App. Aug. 5, 2016), cert. denied (Ala. Oct.14, 2016).

Fuller v. State, 231 So. 3d 1207 (Ala. Crim. App. 2015), cert. quashed, Ex parte Fuller, 231 So. 3d 1222 (Ala. 2017).

Blake v. State, 61 So. 3d 1107 (Ala. Crim. App. 2010).

Barnett v. H.L. Green Co., 233 Ala. 453, 454, 171 So. 911, 912 (1936).

Riley v. Denegre, 201 Ala. 41, 77 So. 335 (1917).

West's Key Number Digest, Assault and Battery ¶13, 24(2), 24(3), 43(4).

West's Key Number Digest, Criminal Law ¶286.

West's Key Number Digest, Public Employment ¶276.

1 Michael L. Roberts, Alabama Tort Law § 28.05 (6th ed. 2015).

Am. Jur. 2d Assault and Battery §§ 146 to 169.

A.L.R. Library

Use of set gun, trap, or similar device on defendant's own property, 47 A.L.R.3d 646.

ASSAULT AND BATTERY

APJI 5.03

Civil liability for use of firearm in defense of habitation or property, 100 A.L.R.2d 1021.

Pleading self-defense or other justification in civil assault and battery action, 67 A.L.R.2d 405.

Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury, or death, 25 A.L.R.2d 1215.

Chapter 6

Attachment—Wrongful [PL]

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APJI 6.00 Attachment—Wrongful [PL]

Title of Instruction	Date Approved	Prior Instruction Number
6.00 Attachment—Wrongful [PL]	5/8/15	6.00

APJI 6.00 ATTACHMENT—WRONGFUL [PL]

Plaintiff (name of plaintiff) says defendant (name of defendant) (wrongfully) (wrongfully and vexatiously) issued an attachment against (name of plaintiff)'s (state the property). (Name of plaintiff) further says (name of defendant) issued the attachment in a lawsuit (he/she/it) had against (name of plaintiff). (Name of plaintiff) says the attachment was wrongfully issued because (state the reason).

(Name of defendant) says (he/she/it) did not wrongfully issue the attachment. (He/she/it) further says (he/she/it) issued the attachment because (state the appropriate ground in Ala. Code § 6-6-42 (1975) (West's Alabama Code)).

An attachment is a process issued by a court against a defendant's real estate or personal property, and it is issued at the plaintiff's request. It is issued to aid the collection of any judgment the plaintiff wins against the defendant.

To have the attachment issued, (name of defendant) or (his/her/its) agent or lawyer had to file a sworn statement that stated three things:

1. The amount of money (name of plaintiff) owed (name of defendant) or the amount of money (name of plaintiff) will owe (name of defendant);
2. That (state the appropriate ground in Ala. Code § 6-6-42 (1975) (West's Alabama Code)); and,
3. That the attachment was not issued to annoy or harass (name of plaintiff).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence that (name of defendant) wrongfully issued the attachment. (Name of defendant) wrongfully issued the attachment if:

(The sworn statement was false.)

((Name of plaintiff) did not owe (name of defendant) any money.)

((Name of defendant) had no ground for the attachment.)

If (name of plaintiff) proves one of these, you must find for (him/her/it) and then you must determine how much money to award (name of plaintiff).

If (name of plaintiff) did not prove any of these, you must find for (name of defendant).

If you find for (name of plaintiff) you will award (him/her/it) compensatory damages. The compensatory damages you can award are (state the types and give the instruction on each). If you find that (name of defendant)'s conduct was wrongful and vexatious in having the attachment issued, you may award punitive damages.

Additional instruction when the action is against the defendant and surety.

(Name of plaintiff) also sues (name of surety). (Name of defendant) had to file a bond in double the amount (he/she/it) claimed in the attachment. The amount of the bond is (\$____.____).

The bond is conditioned that:

1. (Name of defendant) will prosecute the attachment to effect; and,
2. That (he/she/it) will pay (name of plaintiff) all damages (he/she/it) may have because (name of defendant) wrongfully and vexatiously issued the attachment.

If you find for (name of plaintiff) you will also find against (name of surety), but you cannot award against (name of surety) an amount that is more than the amount of the bond.

Approved May 8, 2015

Notes on Use

This instruction rewrites APJI 6.00 (3d ed. 2014) in Plain Language.

The phrase “prosecute the attachment to effect” is ambiguous. The user must consult the case authorities to determine if it means the defendant must have prosecuted the underlying case to conclusion or if it means the defendant must have won the underlying case.

The bench and bar should know that prior opinions hold that although vexatious conduct will support punitive damages, the user should consult Ala. Code § 6-11-20 (1975) (West’s Alabama Code) and determine whether the statute controls punitive damages in a wrongful attachment case.

Vexatious conduct that justifies punitive damages is defined in *City Nat. Bank v. Jeffries*, 73 Ala. 183, 191 (1882). “If there was no reasonable foundation for believing that a legal ground for attachment existed, or if sued out wantonly or recklessly without probable cause, then it is vexatious and wrongful.”

References

Ala. R. Civ. P. 64, 64A, 64B, and committee comments.

Ala. R. Civ. P. 65.1 and committee comments.

Ala. Code §§ 6-6-30 to 168 (1975) (West’s Alabama Code).

“Malicious”—definition, see APJI 24.04.

Punitive Damages, see APJI 11.03.

Ala. Code § 6-6-42 (1975) (West’s Alabama Code). Grounds for an attachment.

Ala. Code § 6-6-44 (1975) (West’s Alabama Code). Affidavit for attachment.

Ala. Code § 6-6-148 (1975) (West’s Alabama Code). Action on Bond, statute of limitations (3 years), and damages recoverable.

Ex parte Lewis, 571 So. 2d 1069 (Ala. 1990).

Bull v. Albright, 254 Ala. 29, 32, 47 So. 2d 266, 268 (1950). A wrongful attachment suit is in tort.

Harrison v. Emens, 235 Ala. 319, 320, 179 So. 219, 220 (1938).

City of Tuscaloosa v. Fair, 232 Ala. 129, 167 So. 276 (1936) (overruled in part by, Jacks v. City of Birmingham, 268 Ala. 138, 105 So. 2d 121 (1958)).

Brown v. Master, 104 Ala. 451, 463, 16 So. 443, 447 (1894). Damages: If the attachment is wrongful, the plaintiff would be entitled to actual damages. If the attachment is both wrongful and vexatious or malicious, then the jury may award punitive or vindictive damages in addition to actual damages.

Allen Trucking Co., Inc. v. Adams, 56 Ala. App. 478, 479, 323 So. 2d 367, 368 (Civ. App. 1975).

Cf., Faith Properties, LLC v. First Commercial Bank, 988 So. 2d 485, 491 (Ala. 2008) (defining attachment but dismissing appeal from void judgment).

West's Key Number Digest, Attachment ⇨1 to 325.

Jenelle Mims Marsh, Alabama Law of Damages §§ 13:1 to 13:18 (6th ed. 2012).

Am. Jur. 2d, Attachment and Garnishment §§ 553 to 601.

C.J.S., Garnishment § 435.

A.L.R. Library

Right to recover attorneys' fees for wrongful attachment, 65 A.L.R.2d 1426.

Posting of redelivery bond by defendant in attachment as waiver of damages for wrongful attachment, 57 A.L.R.2d 1376.

Recovery of value of use of property wrongfully attached, 45 A.L.R.2d 1221.

Chapter 7

Bailments [PL]

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- APJI 7.00 Bailment Defined [PL]
- APJI 7.01 Gratuitous Bailment Defined—Bailee’s Duty of Care [PL]
- APJI 7.02 Lucrative Bailment Defined—Bailee’s Duty of Care [PL]
- APJI 7.03 Bailment for Hire Defined—Bailee’s Duty of Care [PL]
- APJI 7.04 Bailment for Sole Benefit of Bailee—Duty of Extraordinary Care [PL]
- APJI 7.05 Bailment for Mutual Benefit or Hire—Bailor’s Duty of Care [PL]
- APJI 7.06 Gratuitous Bailment—Bailor’s Duty to Warn [PL]

Title of Instruction	Date Approved	Prior Instruction Number
7.00 Bailment Defined [PL]	5/8/15	7.00, 7.04
7.01 Gratuitous Bailment Defined—Bailee’s Duty of Care [PL]	5/8/15	7.01, 7.07
7.02 Lucrative Bailment Defined—Bailee’s Duty of Care [PL]	5/8/15	7.02, 7.05
7.03 Bailment for Hire Defined—Bailee’s Duty of Care [PL]	5/8/15	7.03, 7.05
7.04 Bailment for Sole Benefit of Bailee—Duty of Extraordinary Care [PL]	5/8/15	7.06
7.05 Bailment for Mutual Benefit or Hire—Bailor’s Duty of Care [PL]	5/8/15	7.08
7.06 Gratuitous Bailment—Bailor’s Duty to Warn [PL]	5/8/15	7.09

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Date Approved	Prior Instruction Number
		7.10, 7.11 (Deleted)

APJI 7.00 BAILMENT DEFINED [PL]

A bailment is:

1. One person—called the bailor—delivers personal property to another—called the bailee—for a specific purpose;
2. The bailee voluntarily assumes custody and possession of the property; and,
3. There is an express or implied agreement between them that:
 - A. the bailee will faithfully carry out the purpose for which the property was delivered; and,
 - B. the bailee will return the property or duly account for it, or (he/she/it) will keep the property until the bailor reclaims it.

Approved May 8, 2015

Notes on Use

Use this instruction when the trial judge must give a general definition of bailment.

APJI 10.06, Implied Contract.

APJI 10.07, Oral Contracts.

References

Ziva Jewelry, Inc. v. Car Wash Headquarters, Inc., 897 So. 2d 1011, 1014 (Ala. 2004) (quoting *S/M Industries, Inc. v. Hapag-Lloyd A.G.*, 586 So. 2d 876, 881-82 (Ala. 1991) states: “A bailment is defined as the delivery of personal property by one person to another for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed, and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it. In order for a bailment to exist the bailee must have voluntarily assumed the custody and possession of the property for another.”

Lewis v. Ebersole, 244 Ala. 200, 12 So. 2d 543 (1943). The bailee must have voluntarily assumed custody and possession of property for another.

Woodson v. Hare, 244 Ala. 301, 13 So. 2d 172 (1943). When one person has lawfully acquired possession of personal property of another and holds it under circumstances whereby he ought to keep it safely and restore it or deliver it to the owners, such person and the owner of the property are by operation of law generally treated as “bailee” and “bailor” under contract of bailment, irrespective of whether there has been any mutual assent expressed or implied to such relationship.

Ridgely Operating Co. v. White, 227 Ala. 459, 150 So. 693 (1933). Bailee, to be such, must have possession of property, but possession may be constructive, growing out of the relation of the parties.

Ridgely Operating Co. v. White, 227 Ala. 459, 150 So. 693, 696 (1933). When the bailee loses possession of goods, “negligence is prima facie imputed to him, and he has the burden of showing that the loss was not due to his want of care or that of his servants in the line of their employment and duty.”

Tonini v. Campagna, 991 So. 2d 266, 268 n.2 (Ala. Civ. App. 2008) (bailment defined).

West’s Key Number Digest, Bailment ☞1, 5, 11, 16, 21.

West’s Key Number Digest, Automobiles ☞368.

Ala. Code § 6-5-263 (1975) (West’s Alabama Code). Action for trespass to bailed property.

Jenelle Mims Marsh, Alabama Law of Damages § 17:17[3] (6th ed. 2012).

Am. Jur. 2d, Bailments §§ 1 to 4.

**APJI 7.01 GRATUITIOUS BAILMENT
DEFINED—BAILEE’S DUTY OF
CARE [PL]**

A gratuitous bailment is one made solely for the benefit of the bailor; and in which there is no benefit to the bailee.

In this situation, the bailee must use slight care to protect, preserve, and return the property.

Slight care is the care which every person of common sense, though inattentive, uses in his or her own affairs.

Approved May 8, 2015

Notes on Use

Use this instruction to define gratuitous bailment.

References

Trammell v. Reinhardt Motors, Inc., 545 So. 2d 36 (Ala. 1989).

Bain v. Culbert, 209 Ala. 312, 96 So. 228 (1923).

West’s Key Number Digest, Bailment ⇨12.

West’s Key Number Digest, Automobiles ⇨368.

Jenelle Mims Marsh, Alabama Law of Damages § 17:17 (6th ed. 2012).

Am. Jur. 2d, Bailments § 7, 109, 110, 121.

Black’s Law Dictionary (9th ed. 2009)—“Gratuitous Bailment.” In this situation, the bailee must use slight care to protect, preserve, and return the property.

**APJI 7.02 LUCRATIVE BAILMENT DEFINED—
BAILEE'S DUTY OF CARE [PL]**

A lucrative bailment is one the bailee undertakes for some consideration or payment, or one from which (he/she/it) gets some advantage or benefit.

In this situation, the bailee must use reasonable care to protect, preserve, and return the property.

Reasonable care is the care a reasonably prudent person would use in a similar situation.

Approved May 8, 2015

Notes on Use

Use this instruction to define lucrative bailment and the duty of care the bailee owes the bailor. The bailor's duty is defined in APJI 7.05.

Use APJI 10.04 to define consideration.

References

Bain v. Culbert, 209 Ala. 312, 96 So. 228 (1923). A bailment is lucrative, not gratuitous, if made at the instance or the invitation of the bailor because of expected benefits, direct or contingent.

West's Key Number Digest, Bailment ☞2.

Ala. Code § 7-7-204 (1975) (West's Alabama Code). Warehouseman's liability.

Am. Jur. 2d, Bailments § 7, 109.

Black's Law Dictionary (9th ed. 2009)—“Lucrative Bailment.”

**APJI 7.03 BAILMENT FOR HIRE DEFINED—
BAILEE'S DUTY OF CARE [PL]**

A bailment for hire is an agreement between the bailor and bailee. The bailor agrees to pay the bailee to keep the property safe. The bailee agrees to protect, preserve, and return the property to the bailor in substantially the same condition as received.

In this situation, the bailee must use reasonable care to protect, preserve, and return the property.

Reasonable care is the care a reasonably prudent person would use in a similar situation.

Approved May 8, 2015

Notes on Use

Use this instruction to define bailment for hire and the duty of care the bailee owes the bailor.

References

Prince v. Alabama State Fair, 106 Ala. 340, 345, 17 So. 449 (1895). “A person becomes a bailee for hire when he takes property into his care and custody for compensation. The nature and amount of the compensation are immaterial.”

Atmore Truckers Ass’n v. Westchester Fire Ins. Co., 218 F.2d 461 (5th Cir. 1955).

West’s Key Number Digest, Bailment ¶2, 3.

Am. Jur. 2d, Bailments §§ 7 to 15, 109.

Black’s Law Dictionary (9th ed. 2009)—“Bailment”.

**APJI 7.04 BAILMENT FOR SOLE BENEFIT OF
BAILEE—DUTY OF
EXTRAORDINARY CARE [PL]**

When the bailment is made for the sole benefit of the bailee, (he/she/it) must use extraordinary care to protect, preserve, and return the property.

Extraordinary care is the highest degree of care. It is the degree of care used by careful, diligent, and skilled persons in the same business as the bailee.

Approved May 8, 2015

Notes on Use

None for this instruction.

References

On “extraordinary care” see:

Glenn v. Blackman, 33 Ala. App. 571, 35 So. 2d 698 (1948).

West’s Key Number Digest, Bailment ☞13, 31(3).

Am. Jur. 2d, Bailments § 109 n.6. C.J.S., Bailments §§ 10, 29.

A.L.R. Library

Liability of bank or safe-deposit company for its employee’s theft or misappropriation of contents of safe-deposit box, 39 A.L.R. 4th 543.

Bailee’s duty to insure bailed property, 28 A.L.R.3d 513.

When statute of limitations starts to run against bailor’s action for recovery, or for damages for conversion or detention, of property deposited for an indefinite time, 57 A.L.R.2d 1044.

Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle, 17 A.L.R.2d 1388.

Duty of consignee as to valuation of goods on reshipment to consignor, 16 A.L.R.2d 866.

Privity as between lessor or bailor and lessee or bailee of personal property as regards effect of judgment in third person's action for damages against lessee or bailee as res judicata in lessor's or bailor's subsequent action against third person for damage to the property, or vice versa, 4 A.L.R.2d 1378.

**APJI 7.05 BAILMENT FOR MUTUAL BENEFIT
OR HIRE—BAILOR’S DUTY OF
CARE [PL]**

When the bailment benefits the bailor and the bailee, the bailor must use reasonable care to see that the property is reasonably fit for use. The property must be reasonably fit for the purpose it is normally used or the purpose the bailor knew it would be used. The bailor must inspect the property for defects, and if any exist (he/she/it) must repair them.

Reasonable care is the care a reasonably prudent person would use in a similar situation.

Approved May 8, 2015

Notes on Use

None for this instruction.

References

Penton v. Favors, 262 Ala. 262, 78 So. 2d 278 (1955). This duty on the bailor extends to the bailee and any other persons who are likely to be subjected to danger, if their (danger) (presence) (use) could reasonably have been anticipated by the bailor when the bailment was created.

Aircraft Sales & Service v. Gantt, 255 Ala. 508, 52 So. 2d 388 (1951). The bailor is liable for any defects in the bailed property which are known to him, or those which he could have discovered by the exercise of reasonable care. This includes a duty upon the bailor to conduct a reasonable inspection of the property before delivery (including such tests as the intended use would suggest to sensible and right-minded persons); and, if any defects are (or should have been) discovered, the additional duty to use reasonable care to remedy any such defects prior to delivering the property to the bailee.

Woodson v. Hare, 244 Ala. 301, 13 So. 2d 172 (1943).

Saunders System Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72 (1928).

Mallory S.S. Co. v. Druhan, 17 Ala. App. 365, 84 So. 874 (1920).

West's Key Number Digest, Bailment ⇨9, 14(1).

Am. Jur. 2d, Bailments §§ 149 to 155.

A.L.R. Library

Liability for loss of hat, coat, or other property deposited by customer in place of business, 54 A.L.R.5th 393.

Liability of owner or bailor of horse for injury by horse to hirer or bailee thereof, 6 A.L.R.4th 358.

Liability of owner or operator of powered pleasure boat for injuries to swimmer or bather struck by boat, 98 A.L.R.3d 1127.

Liability of owner of powerboat for injury or death allegedly caused by one permitted to operate boat by owner, 71 A.L.R.3d 1018.

Employer's liability for theft or disappearance of employee's property left at the place of employment, 46 A.L.R.3d 1306.

Liability of owner or operator of powered pleasure boat for injuries to swimmer or bather struck by boat, 98 A.L.R.3d 1127.

Bailee's lien for work on goods as extending to other goods of the bailor in his possession, 25 A.L.R.2d 1037.

Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle, 17 A.L.R.2d 1388.

Privity as between lessor or bailor and lessee or bailee of personal property as regards effect of judgment in third person's action for damages against lessee or bailee as res judicata in lessor's or bailor's subsequent action against third person for damage to the property, or vice versa, 4 A.L.R.2d 1378.

**APJI 7.06 GRATUITOUS BAILMENT—
BAILOR'S DUTY TO WARN [PL]**

When the bailment is gratuitous, the bailor must warn the bailee about any dangerous defects (he/she/it) knows about. But, the bailor does not have to inspect the property for defects.

A defect is dangerous if there is a reasonable probability it will cause harm. The harm can be to the bailee or another person when property is used as it ordinarily would be used or is used for the purpose the bailor knew it would be used.

Approved May 8, 2015

Notes on Use

None for this instruction.

References

Penton v. Favors, 262 Ala. 262, 78 So. 2d 278 (1955). However, such bailor is not liable for any injuries (or damages) resulting from defects in the bailed property of which he had no actual knowledge (even though he should have known of them); nor is he under any duty to inspect the bailed property, prior to the delivery of it, for any hidden defects which it might contain.

West's Key Number Digest, Bailment ☞9, 13.

Am. Jur. 2d, Bailments § 99.

A.L.R. Library

Liability of owner or operator of powered pleasure boat for injuries to swimmer or bather struck by boat, 98 A.L.R.3d 1127.

Liability of owner of powerboat for injury or death allegedly caused by one permitted to operate boat by owner, 71 A.L.R.3d 1018.

Employer's liability for theft or disappearance of employee's property left at the place of employment, 46 A.L.R.3d 1306.

Liability of owner or operator of powered pleasure boat for injuries to swimmer or bather struck by boat, 98 A.L.R.3d 1127.

Privity as between lessor or bailor and lessee or bailee of personal property as regards effect of judgment in third person's action for damages against lessee or bailee as *res judicata* in lessor's or bailor's subsequent action against third person for damage to the property, or vice versa, 4 A.L.R.2d 1378.

Chapter 8

Burden of Proof [PL]

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- APJI 8.00 Plaintiff's Burden of Proof [PL]
- APJI 8.01 Affirmative Defense by Defendant [PL]
- APJI 8.02 Statute of Limitation—Defense [PL]
- APJI 8.03 Statute of Frauds—No Writing—Defense [PL]
- APJI 8.04 Statute of Frauds—Insufficient Writing—Defense [PL]
- APJI 8.05 Counterclaim [PL]

Title of Instruction	Date Approved	Prior Instruction Number
APJI 8.00 Plaintiff's Burden of Proof [PL]	11/8/13	8.00
APJI 8.01 Affirmative Defense by Defendant [PL]	11/8/13	8.01
APJI 8.02 Statute of Limitation—Defense [PL]	11/8/13	8.02
APJI 8.03 Statute of Frauds—No Writing—Defense [PL]	11/8/13	8.03
APJI 8.04 Statute of Frauds—Insufficient Writing—Defense [PL]	11/8/13	8.03
APJI 8.05 Counterclaim [PL]	11/8/13	8.04

**APJI 8.00 PLAINTIFF’S BURDEN OF PROOF
[PL]**

(Name of plaintiff) says (state the plaintiff’s contention(s)).

(Name of defendant) denies that (he/she/it) (e.g., was negligent/ breached the contract).

(Name of plaintiff) must prove to your reasonable satisfaction from the evidence (state what the plaintiff must prove).

If (name of plaintiff) proves (this/ all these things) you must find for (name of plaintiff), and then you must determine the amount of money (that will reasonably compensate (him/her/it) for the harm) (to award (name of plaintiff)).

If (name of plaintiff) does not prove (this/all these things), you must find for (name of defendant).

Approved November 8, 2013

Notes on Use

This is a generic instruction and it can be used in a case when there is no APJI instruction on the specific claim. Examples of a statement of the plaintiff’s contentions are in APJI 1.29, 1.30, and 26.10.

The language “(to award (name of plaintiff))” can be used when the jury may award punitive damages.

References

Evans v. Kilgore, 246 Ala. 647, 21 So. 2d 842 (1945).

Silverfield v. Globe Indem. Co., 31 Ala. App. 499, 19 So. 2d 76 (1944), disapproved of, Evans v. Kilgore, 246 Ala. 647, 21 So. 2d 842 (1945).

Metropolitan Life Ins. Co. v. Brown, 27 Ala. App. 602, 177 So. 178 (1937). The burden is on the plaintiff to reasonably satisfy the

jury from the evidence that all material allegations of the complaint are true.

West's Key Number Digest, Evidence ⌘91.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 44.02 (5th ed. 2010).

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence §§ 3:13 to 3:16, 3:26 to 3:31 (3d ed. 2013).

Jerome A. Hoffman & William A. Schroeder, Burdens of Proof, 38 Ala. L. Rev. 31, 55 (1986).

Ala. R. Civ. P. 8, 16.

**APJI 8.01 AFFIRMATIVE DEFENSE BY
DEFENDANT [PL]**

(Name of defendant) says (name of plaintiff) cannot recover because (state the affirmative defense).

If (name of defendant) reasonably satisfies you from the evidence that (state what the defendant must prove), (name of plaintiff) cannot recover on (his/her/its) claim.

Approved November 8, 2013

Notes on Use

This instruction may be used when the defendant pleads an affirmative defense on which the Committee has not published a specific instruction. See, e. g., APJI 8.02 (Statute of Limitations), 8.03 (Statute of Frauds), 30.00 (Contributory Negligence), 33.03 (Assumption of the Risk), 31.04 (Open and Obvious Defense), and others.

References

Ex parte Ramsay, 829 So. 2d 146, 152 (Ala. 2002) (affirmative defense defined).

King v. Aird, 251 Ala. 613, 38 So. 2d 883 (1949). The burden of proof rests on the party asserting the affirmative defense and never shifts; the burden of producing evidence may shift.

Horton v. Spears, 238 Ala. 464, 191 So. 622 (1939). The burden of proving a disputed fact rests upon the party affirming its existence and claiming to derive a right and benefit from it.

West's Key Number Digest, Evidence ¶91, 94, 96(1).

Ala. R. Civ. P. 8(c).

See generally, Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* (5th ed. 2010).

N. De Wayne Pope, *A Practitioner's Guide to Affirmative Defenses in Alabama*, 57 Ala. Law. 86 (March 1996).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 3:13–3:16, 3:26–3:31 (3d ed. 2013).

Jerome A. Hoffman & William A. Schroeder, Burdens of Proof,
38 Ala. L. Rev. 31, 55 (1986).

**APJI 8.02 STATUTE OF LIMITATION—
DEFENSE [PL]**

(Name of defendant) says (name of plaintiff) cannot recover because (his/her/its) claim is barred by the Statute of Limitation of ____ years.

(Name of plaintiff) must prove to your reasonable satisfaction from the evidence that (he/she/it) began this case within ____ years from when (state the appropriate language for when the cause of action accrued). This case began (state the date).

If (name of plaintiff) does not prove that (he/she/it) began this case within ____ years from (state the appropriate accrual language), you must find for (name of defendant).

Approved November 8, 2013

Notes on Use

Use this instruction when the defendant pleads the affirmative defense of the statute of limitation and makes a prima facie showing that the defense is applicable. *Rivers Machinery Co., Inc. v. Barclay Intern., Inc.*, 553 So. 2d 579, 11 U.C.C. Rep. Serv. 2d 890 (Ala. 1989).

This instruction does not state the test for when the cause of action accrues because the language of the test depends on the cause of action. The user must consult the statutory and case law for the test that applies to the cause of action.

The references do not reference all the code sections that state a limitations period.

References

Ala. Code §§ 6-2-1 to 6-2-17, 6-2-30 to 6-2-41 (1975) (West's Alabama Code).

Ala. Code § 6-5-482 (1975) (West's Alabama Code) (medical negligence).

Ala. Code § 6-5-502 (1975) (West's Alabama Code) (products liability). Section 6-5-502(c) declared unconstitutional, *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982).

Ala. Code § 6-5-574 (1975) (West's Alabama Code) (Legal Services Liability Act).

Ala. Code § 43-2-250 (1975) (West's Alabama Code) (appointment of administrator ad litem).

Ex parte Capstone Bldg. Corp., 96 So. 3d 77 (Ala. 2012) (prospectively—the statute of limitation for negligent and wanton conduct is two years).

CNH America, LLC v. Roebuck, 41 So. 3d 41, 70 U.C.C. Rep. Serv. 2d 89 (Ala. 2009) (AEMLD-breach of warranty).

Brown v. General Motors Corp., 14 So. 3d 104, 67 U.C.C. Rep. Serv. 2d 924 (Ala. 2009) (per curiam) (overruling *Tittle v. Steel City Oldsmobile GMC Truck, Inc.*, 544 So. 2d 883, 8 U.C.C. Rep. Serv. 2d 701 (Ala. 1989)).

Tobiassen v. Sawyer, 904 So. 2d 258 (Ala. 2004).

Rivers Machinery Co., Inc. v. Barclay Intern., Inc., 553 So. 2d 579, 11 U.C.C. Rep. Serv. 2d 890 (Ala. 1989).

Cities Service Oil Co. v. Griffin, 357 So. 2d 333, 341 (Ala. 1978).

Mitchell v. Thornley, 98 So. 3d 556 (Ala. Civ. App. 2012).

Alabama Farmers Co-op., Inc. v. PricewaterhouseCoopers, LLP, 911 So. 2d 689, 691 (Ala. Civ. App. 2004), rev'd on other grounds, *Ex parte Alabama Farmers Co-op., Inc.*, 911 So. 2d 696 (Ala. 2004), as modified on denial of rehearing (Feb. 25, 2005).

Ferdon Realty Co., Inc. v. Keith, 487 So. 2d 917 (Ala. Civ. App. 1985). This is an exception to the general rule that the party asserting the affirmative of an issue has the burden of proving it. When the statute of limitations is pleaded, the burden is on the plaintiff to prove a cause of action was filed within the period of the bar.

West's Key Number Digest, Limitations of Actions ⇨195(1).

Ala. R. Civ. P. 8(c).

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 46.01 to.04 (5th ed. 2010).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 3.05, 4.05, 17.11, 18.06, 19.11, 20.21, 21.07, 23.07, 24.17, 29.08, 30.09, 37.09 (5th ed. 2010).

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 11:19 to 11:26 (6th ed. 2012).

Am. Jur. 2d *Limitation of Actions* §§ 377–408.

Jerome A. Hoffman & William A. Schroeder, *Burdens of Proof*, 38 Ala. L. Rev. 31, 55 (1986).

A.L.R. Library

Imprisonment of party to civil action as tolling statute of limitations, 77 A.L.R.3d 735.

Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations, 90 A.L.R.2d 265.

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 A.L.R.2d 1399.

Defense of adverse possession or statute of limitations as available under general denial or plea of general issue in ejectment action, 39 A.L.R.2d 1426.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Change in party after statute of limitations has run, 8 A.L.R.2d 6.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action, 1 A.L.R.2d 630.

**APJI 8.03 STATUTE OF FRAUDS—NO
WRITING—DEFENSE [PL]**

Ala. Code § 8-9-2 (1975) (West’s Alabama Code)

The law is that some agreements must be in writing.

(Name of defendant) says the claimed agreement must be in writing because (state the specific statutory provision). (Name of plaintiff) says the agreement did not have to be in writing because (state why plaintiff says the statute does not apply).

(Name of plaintiff) must reasonably satisfy you from the evidence that the agreement did not have to be in writing. If (he/she/it) does not, you must find for (name of defendant).

Approved November 8, 2013

Notes on Use

This instruction can be used when the defendant pleads the statute of frauds and the defendant makes a prima facie showing that the defense is applicable. *Simmons v. Simmons*, 99 So. 3d 316 (Ala. Civ. App. 2011) (party invoking the statute must make a prima facie showing that the contract meets the criteria of the statute). The instruction assumes the defendant admits an oral agreement and it must be modified if the defendant denies an agreement but pleads the statute of frauds.

The defense of the statute of frauds is an affirmative defense, and the plaintiff must prove matter that avoids the statute. *Ex parte Ramsay*, 829 So. 2d 146 (Ala. 2002).

References

Ala. Code § 8-9-2 (1975) (West’s Alabama Code).

See, Ala. Code § 7-2-201 (1975) (West’s Alabama Code) (contract for the sale of goods).

Alabama Agr. & Mech. University v. Jones, 895 So. 2d 867, 196 Ed. Law Rep. 1001 (Ala. 2004).

Ex parte Ramsay, 829 So. 2d 146 (Ala. 2002).

Simmons v. Simmons, 99 So. 3d 316 (Ala. Civ. App. 2011).

Miller v. Brown-Fikes Ford, Inc., 370 So. 2d 1052 (Ala. Civ. App. 1979).

Forbes & Carlross v. Plummer, 198 Ala. 162, 73 So. 451 (1916). When issue is taken on a plea of the statute of frauds, the burden is on the plaintiff to show a valid contract.

Jonas v. Field, 83 Ala. 445, 3 So. 893 (1888). This is an exception to the general rule that the party asserting the affirmative of an issue has the burden of proving it. In an action on a contract of employment where the defendant pleads the statute of frauds, it is incumbent on the plaintiff to make out his case by proving a contract without the statute.

West's Key Number Digest, Contracts ⌘46, 333(2)–(3).

West's Key Number Digest, Frauds, Statute of ⌘152(1), 152(2), 158(1).

Ala. R. Civ. P. 8.

Am. Jur. 2d Statute of Frauds §§ 475–500.

Jenelle Mims Marsh, Alabama Law of Damages § 17.11 (6th ed. 2012).

Johnni L. Franks, Promoting or Frustrating the Statute of Frauds? Implications from Holman v. Childersburg Bancorporation, Inc., 8 Jones L. Rev. 35 (2004).

Jerome A. Hoffman & William A. Schroeder, Burdens of Proof, 38 Ala. L. Rev. 31, 55 (1986).

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Comment Note.—Statute of frauds and conflict of laws, 47 A.L.R.3d 137.

Applicability of statute of frauds to agreement to rescind contract for sale of land, 42 A.L.R.3d 242.

Creditor's acceptance of obligation of third person as constituting novation, 61 A.L.R.2d 755.

Effect of attempted cancelation or erasure in memorandum otherwise sufficient to satisfy statute of frauds, 31 A.L.R.2d 1112.

Oral acceptance of written offer by party sought to be charged as satisfying statute of frauds, 30 A.L.R.2d 972.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another, 20 A.L.R.2d 246.

Memorandum which will satisfy statute of frauds, as predicable in whole or part upon writings prior to the oral agreement, 1 A.L.R.2d 841.

**APJI 8.04 STATUTE OF FRAUDS—
INSUFFICIENT WRITING—
DEFENSE [PL]**

Ala. Code § 8-9-2 (1975) (West’s Alabama Code)

The law is there must be a note or memorandum of some agreements, and the note or memorandum must state the consideration for the agreement, and it must be signed by (name of defendant/some person authorized by defendant).

(Name of defendant) says the claimed written agreement does not meet these requirements because (state why).

(Name of plaintiff) must reasonably satisfy you from the evidence that the writing is a sufficient written agreement. If (he/she/it) does not, you must find for (name of defendant).

Approved November 8, 2013

APJI 8.05 COUNTERCLAIM [PL]

(Name of defendant) says (state the counterclaimant's contention(s)).

(Name of plaintiff) denies (state what plaintiff denies).

(Name of defendant) must prove to your reasonable satisfaction from the evidence (state what the defendant must prove).

If (name of defendant) proves (this/all these things) you must find for (him/her/it) on the counterclaim, and then you must determine the amount of money (that will reasonably compensate (him/her/it)) (to award (him/her/it)).

If (name of defendant) does not prove (this/all these things), you must find for (name of plaintiff) on (name of defendant)'s counterclaim.

Approved November 8, 2013

Notes on Use

Use this instruction when the defendant counterclaims against the plaintiff. Examples of a statement of contentions are stated in APJI 1.29, 1.30, 26.10, 28.00, 31.00 and other instructions.

References

Moore v. Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798 (1898).

West's Key Number Digest, Evidence ⚡96(2).

Ala. R. Civ. P. 13.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence §§ 3:13–3:16, 3:26–3:31 (3d ed. 2013).

Jerome A. Hoffman & William A. Schroeder, Burdens of Proof, 38 Ala. L. Rev. 31, 55 (1986).

APJI 8.05

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Counterclaim or the like as affecting appellate jurisdictional amount, 58 A.L.R.2d 84.

Right of defendant in action for personal injury, property damage, or death, to bring in new parties as cross defendants to his counterclaim or the like, 46 A.L.R.2d 1253.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill, or cross action, 1 A.L.R.2d 630.

Federal Tort Claims Act, 1 A.L.R.2d 222.

Chapter 9

Business Restrictive Covenants [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 9.00 Contract Formation [PL]
- APJI 9.01 Restrictive Covenant—No-Hire Agreement Ala. Code § 8-1-190(b)(1) (1975) (West's Alabama Code) [PL]
- APJI 9.02 Restrictive Covenant—Exclusive Dealing Agreement Ala. Code § 8-1-190(b)(2) (1975) (West's Alabama Code) [PL]
- APJI 9.03 Restrictive Covenant—Non-Solicitation Agreement – Sale of Goodwill Of a Business Ala. Code § 8-1-190(b)(3) (1975) (West's Alabama Code) [PL]
- APJI 9.04 Restrictive Covenant—Non-Compete Agreement Ala. Code § 8-1-190(b)(4) (1975) (West's Alabama Code) [PL]
- APJI 9.05 Restrictive Covenant—Non-Solicitation Agreement Ala. Code § 8-1-190(b)(5) (1975) (West's Alabama Code) [PL]
- APJI 9.06 Restrictive Covenant—Non-Compete Agreement—Dissolution of a Business Ala. Code § 8-1-190(b)(6) (1975) (West's Alabama Code) [PL]
- APJI 9.07 Protectable Interest—Defined Ala. Code § 8-1-191 (1975) (West's Alabama Code) [PL]
- APJI 9.08 Protectable Interest—Specialized Training Ala. Code § 8-1-191(a)(5) (1975) (West's Alabama Code) [PL]
- APJI 9.09 Protectable Interest—Confidential Information Ala. Code § 8-1-191(a)(2) (1975) (West's Alabama Code) [PL]
- APJI 9.10 Undue Hardship—Affirmative Defense Ala. Code § 8-1-194 (1975) (West's Alabama Code) [PL]
- APJI 9.11 Protectable Interests—Job Skills [PL]
- APJI 9.12 Professional's Exemption—Defensive Ala. Code § 8-1-196 (1975) (West's Alabama Code) [PL]
- APJI 9.13 Damages—Introduction [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

- APJI 9.14 Actual Damages [PL]
 APJI 9.15 Damages—Breach of Contract [PL]
 APJI 9.16 Liquidated Damages [PL] (Caution—Read Notes on Use)
 APJI 9.17 Nominal Damages [PL]

Title of Instruction	Date Approved	Prior Instruction Number
APJI 9.00 Contract Formation [PL]	11/9/18	New
APJI 9.01 Restrictive Covenant—No-Hire Agreement—Ala. Code § 8-1-190(b)(1) (1975) (Alabama Code) [PL]	11/9/18	New
APJI 9.02 Restrictive Covenant—Exclusive Dealing Agreement—Ala. Code § 8.1.190(b)(2) (West’s Alabama Code) [PL]	11/9/18	New
APJI 9.03 Restrictive Covenant—Non-Solicitation—Sale of Goodwill of a Business—Ala. Code § 8-1-190(b)(3)(1975) (West’s Alabama Code) [PL]	11/9/18	New
APJI 9.04 Restrictive Covenant—Non-Compete Agreement—Ala. Code § 8-1-190(b)(4) (1975) (West’s Alabama Code) [PL]	11/9/18	New
APJI 9.05 Restrictive Covenant—Non-Solicitation Agreement—Ala. Code § 8-1-190(b)(5) (1975) (West’s Alabama Code) [PL]	11/9/18	New
APJI 9.06 Restrictive Covenant—Non-Compete Agreement—Dissolution of a Business—Ala. Code § 8-1-190(b)(6) (1975) (West’s Alabama Code) [PL]	11/9/18	New
APJI 9.07 Protectable Interest—Defined—Ala. Code § 8-1-191 (1975) (West’s Alabama Code) [PL]	1/11/19	New
APJI 9.08 Protectable Interest—Specialized Training—Ala. Code § 8-1-191(a)(5) (1975) (West’s Alabama Code) [PL]	2/8/19	New

BUSINESS RESTRICTIVE COVENANTS [PL]

Title of Instruction	Date Approved	Prior Instruction Number
APJI 9.09 Protectable Interest—Confidential Information—Ala. Code § 8-1-191(a)(2) (1975) (West's Alabama Code) [PL]	1/11/19	New
APJI 9.10 Undue Hardship—Affirmative Defense—Ala. Code § 8-1-194 (1975) (West's Alabama Code) [PL]	2/8/19	New
APJI 9.11 Protectable Interests—Job Skills [PL]	2/8/19	New
APJI 9.12 Professional's Exemption—Defensive—Ala. Code § 8-1-196 (1975) (West's Alabama Code) [PL]	3/1/19	New
APJI 9.13 Damages—Introduction [PL]	2/8/19	New
APJI 9.14 Actual Damages [PL]	2/8/19	New
APJI 9.15 Damages—Breach of Contract [PL]	2/8/19	New
APJI 9.16 Liquidated Damages [PL]	2/8/19	New
APJI 9.17 Nominal Damages [PL]	11/9/18	New

APJI 9.00 CONTRACT FORMATION [PL]

Plaintiff (name of plaintiff) says the defendant (name of defendant) breached an agreed restrictive covenant.

(Name of plaintiff) says (he/she/it) and (name of defendant) agreed to (state the type of restrictive covenant and its terms). (Name of plaintiff) says that (name of defendant) breached the agreement.

(Name of plaintiff) says (name of defendant) breached it by (state a brief description of how the plaintiff says the defendant breached the agreement, e.g., solicited business from plaintiff's customers, etc.).

This type of agreement limits a person from pursuing (his/her) otherwise lawful trade or business activity. These agreements are legal, but allowed only in limited and specific circumstances.

((Name of defendant) says the agreement is not valid because (state the defenses/affirmative defenses)).

To be valid, (name of plaintiff) must first prove to your reasonable satisfaction from the evidence:

1. That the agreement is in writing;
2. That (name of plaintiff) and (name of defendant) signed it; and,
3. That adequate consideration supports the agreement.

If (name of plaintiff) proved these three elements, you will continue your deliberations and follow the other instructions I will give you.

If (name of plaintiff) did not prove these three elements, you must find for (name of defendant).

Approved Nov. 9, 2018.

Notes on Use

Use this and the following instructions in any lawsuit filed after January 1, 2016, even if the agreement was entered into before that date.

There are six acceptable types of restrictive covenants. Ala. Code § 8-1-190(b)(1)–(6) (1975) (West’s Alabama Code). This instruction states the threshold burden of proof when the plaintiff claims the defendant breached one or more of them. Ala. Code § 8-1-192, 194. All the defenses to contract formation are available to the defendant. Ala. Code § 8-1-195(b).

The instructions that follow are labeled or titles the type of restrictive covenant for the user’s ease of reference.

The words “adequate consideration” emphasize that the employer-employee relationship must exist when the parties sign an agreement under Ala. Code §§ 8-1-190(b)(4), (5). *Pitney Bowes, Inc. v. Berney Office Solutions*, 823 So. 2d 659 (Ala. 2001). Of course, consideration must exist as that legal term is commonly understood. Continued employment is adequate consideration.

See APJI 10.4, Consideration, and Chapter 10 generally.

References

Pitney Bowes, Inc. v. Berney Office Solutions, 823 So. 2d 659, 662 (Ala. 2001) (the agreement is void unless an employer-employee relationship existed when the covenant was signed).

AAL USA, Inc. v. Black Hall Aerospace, Inc., No 2:16-CV-02090-KOB, 2018 WL 3036370 at *4 (N.D. Ala. 2018) (restrictive covenant void when one party did not sign the agreement).

West’s Key Number Digest, Contracts ¶53, 116, 117, 118.

Ala. Code §§ 8-1-190(a), 192, 193, 194 (1975) (West’s Alabama Code).

John Edward Murray, Jr., *Murray on Contracts* §§ 72 to 82, 335, 336 (2nd rev. ed. 1974).

Will Hill Tankersley, et. al, *Alabama Enacts Major Revision of Alabama Code 8-1-1*, 76 Ala. Law. 384 (Nov. 2015).

APJI 9.00**ALABAMA PATTERN JURY INSTRUCTIONS**

Christopher W. Weller, Enforcing Non-Compete Agreements in Alabama, 1 *Faulkner L. Rev.* 135 (Fall, 2009).

Michael Edwards, et. al., The Enforceability of Covenants not to Compete in Alabama, 65 *Ala. Law.* 41 (Jan. 2004).

**APJI 9.01 RESTRICTIVE COVENANT—NO-HIRE AGREEMENT
ALA. CODE § 8-1-190(B)(1) (1975)
(WEST’S ALABAMA CODE) [PL]**

If you have found the agreement is valid, then you must decide if it is enforceable.

(Name of plaintiff) can enforce a no-hire agreement only if (he/she/it) proves to your reasonable satisfaction from the evidence:

1. That the agreement only requires (name of defendant) not hire or employ (name of plaintiff’s agent/servant/employee); and,
2. That (name of the hired agent/servant/employee) held a position uniquely essential to the management, organization, or service of (name of plaintiff).

Uniquely essential means:

- A. (Name of the person hired) held a position with (name of plaintiff) important to the business; and,
- B. (Name of the person hired)’s services would be very hard to replace.

If (name of plaintiff) did not prove these two elements, you must find for (name of defendant).

If (name of plaintiff) proved the two elements, (he/she/it) must prove four additional elements before you can find for (him/her/it). These elements are:

1. The agreement must preserve a protectable interest;
2. The agreement’s restriction is reasonably necessary to preserve that protectable interest;
3. (Name of defendant) breached the agreement; and,

APJI 9.01**ALABAMA PATTERN JURY INSTRUCTIONS**

4. The breach harmed (name of plaintiff).

If (name of plaintiff) did not prove these four elements, you must find for (name of defendant).

If (name of plaintiff) proved these four elements, you must find for (him/her/it), and then you must determine an amount to award (him/her/it) as damages.

Approved November 9, 2018

Notes on Use

See APJI 9.07, Protectable Interest.

References

Ala. Code § 8-1-190(b)(1) (1975) (West's Alabama Code).

**APJI 9.02 RESTRICTIVE COVENANT—
EXCLUSIVE DEALING AGREEMENT
ALA. CODE § 8-1-190(B)(2) (1975)
(WEST’S ALABAMA CODE) [PL]**

If you have found the agreement is valid, then you must decide if it is enforceable.

(Name of plaintiff) can enforce an exclusive dealing agreement only if (he/she/it) proves to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) and (name of defendant) agreed to limit their commercial dealings to each other;
2. That the agreement preserved a protectable interest;
3. That (name of defendant) breached the agreement; and,
4. That the breach harmed (name of plaintiff).

If (name of plaintiff) proved these four elements, you must find for (him/her/it), and then you must determine an amount to award (name of plaintiff) as damages.

If (name of plaintiff) did not prove these elements, you must find for (name of defendant).

Approved November 9, 2018

Notes on Use

See APJI 9.07, Protectable Interest.

References

Ala. Code § 8-1-190(b)(2) (1975) (West’s Alabama Code).

**APJI 9.03 RESTRICTIVE COVENANT—NON-SOLICITATION AGREEMENT – SALE OF GOODWILL OF A BUSINESS
ALA. CODE § 8-1-190(B)(3) (1975)
(WEST’S ALABAMA CODE) [PL]**

If you have found the agreement is valid, then you must decide if it is enforceable.

(Name of plaintiff) can enforce a non-compete agreement in connection with the sale of the goodwill of (his/her/its) business. (He/she/it) can enforce the agreement only if (he/she/it) proves to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) sold the goodwill of (name of business) to (name of defendant);
2. That the non-solicitation agreement required that (name of defendant) not solicit customers of (name of business) sold to (name of defendant);
3. That the non-solicitation agreement specified a geographic area where (name of defendant) could not solicit customers of (name of business);
4. That (name of plaintiff) is carrying on a like business within that geographical area; and,
5. That the non-solicitation agreement sets a reasonable time (name of defendant) could not solicit (name of business)’s customers.

If (name of plaintiff) did not prove these five elements, you must find for (name of defendant).

If (name of plaintiff) did prove these five elements, (he/she/it) must prove four additional elements before you can find for (him/her/it). These elements are:

1. The agreement must preserve a protectable interest;

2. The agreement's restriction is reasonably necessary to preserve that protectable interest;

3. (Name of defendant) breached the agreement; and,

4. The breach harmed (name of plaintiff).

If (name of plaintiff) did not prove these four elements, you must find for (name of defendant).

If (name of plaintiff) proved these four elements, you must then determine an amount to award (him/her/it) as damages.

Approved November 9, 2018

Notes on Use

Under Ala. Code § 8-1-190(a)(3), restraints of 12 months are presumed to be reasonable. This presumption is a rebuttable presumption. If the reasonableness of the duration of the restraint is at issue, refer to APJI 15.32 for instructions about rebuttable presumptions.

See APJI 9.07, Protectable Interest.

References

Martin v. Battistella, 9 So. 3d 1235, 1238 (Ala. 2008).

Gilmore Ford, Inc. v. Turner, 599 So. 2d 29 (Ala. 1992).

Cf. Newark Morning Ledger Co. v. U. S., 507 U.S. 546, 555 (1993) (defines good will for the purpose of determining depreciation).

West's Key Number Digest, Good Will ☞1 to 7.

Jenelle Mims Marsh, Alabama Law of Damages § 17:13 (6th ed. 2012).

1 Ally Windsor Howell, Alabama Personal Injury and Torts § 10:26 (2018 ed.).

Ally Windsor Howell, Tilley's Alabama Equity § 3:3 (5th ed. June 2018).

APJI 9.03**ALABAMA PATTERN JURY INSTRUCTIONS**

Ala. Code § 8-1-190(b)(3) (1975) (West's Alabama Code).

**APJI 9.04 RESTRICTIVE COVENANT—NON-
COMPETE AGREEMENT
ALA. CODE § 8-1-190(B)(4) (1975)
(WEST’S ALABAMA CODE) [PL]**

If you have found the agreement is valid, then you must decide if it is enforceable.

(Name of plaintiff) can enforce a non-compete agreement only if (he/she/it) reasonably satisfies you from the evidence:

1. That the agreement required that (name of defendant) not carry on a similar business within (describe the geographic area) for (describe the time constraint);
2. That (name of plaintiff) and (name of defendant) are both carrying on a similar business in (describe the geographic area); and,
3. The agreement has reasonable geographic and time restraints.

If (name of plaintiff) did not prove these three elements, you must find for (name of defendant).

If (name of plaintiff) did prove the three elements, (he/she/it) must prove four additional elements before you can find for (him/her/it). These elements are:

1. The agreement must preserve a protectable interest;
2. The agreement’s restrictions are reasonably necessary to preserve that protectable interest;
3. (Name of defendant) breached the agreement; and,
4. The breach harmed (name of plaintiff).

If (name of plaintiff) did not prove these four elements, you must find for (name of defendant).

If (name of plaintiff) proved these four elements, you must find for (him/her/it), and then you must determine an amount to award (him/her/it) as damages.

Approved November 9, 2018

Notes on Use

Under to Ala. Code § 8-1-190(a)(4), restraints of two years or less are presumed to be reasonable. This presumption is a rebuttable presumption. If the reasonableness of the duration of the restraint is at issue, refer to APJI 15.32 for instructions about rebuttable presumptions.

See APJI 9.07, Protectable Interest.

References

Ala. Code § 8-1-190(b)(4) (1975) (West's Alabama Code).

See *Russell v. Birmingham Oxygen Service, Inc.*, 408 So. 2d 90 (Ala. 1981) (seller of business was not in competition with the buyer when the buyer did not go into business, and the seller later reentered the same business).

APJI 9.05 RESTRICTIVE COVENANT—NON-SOLICITATION AGREEMENT
ALA. CODE § 8-1-190(B)(5) (1975)
(WEST'S ALABAMA CODE) [PL]

If you have found the agreement valid, then you must decide if it is enforceable.

(Name of plaintiff) can enforce a non-solicitation agreement only if (he/she/it) reasonably satisfies you from the evidence:

1. That the agreement only requires that (name of defendant) not solicit current customers for (state the time constraint);
2. That (name of plaintiff) and (name of defendant) are carrying on a like business; and,
3. That the time constraint is reasonable.

If (name of plaintiff) did not prove these three elements, you must find for (name of defendant).

If (name of plaintiff) did prove the three elements, (he/she/it) must prove four additional elements before you can find for (him/her/it). These elements are:

1. The agreement must preserve a protectable interest;
2. The agreement's restrictions are reasonably necessary to preserve that protectable interest;
3. (Name of defendant) breached the agreement; and,
4. The breach harmed (name of plaintiff).

If (name of plaintiff) did not prove these four elements, you must find for (name of defendant).

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If (name of plaintiff) proved these four elements, you must find for (him/her/it), and then you must determine an amount to award (him/her/it) as damages.

Approved November 9, 2018

Notes on Use

Under Ala. Code § 8-1-190(a)(5), restraints of 18 months are presumed reasonable. This presumption is a rebuttable presumption. If the reasonableness of the duration of the restraint is at issue, refer to APJI 15.32 for instructions about rebuttable presumptions.

If the plaintiff maintains that he/she/it has been paying post separation compensation, the last of the three elements above would be:

3.) The time restraint is reasonable. Restraints that last as long as reasonable post-separation consideration is paid by (name of plaintiff) to (name of defendant) are presumed to be reasonable in duration.

See APJI 9.07, Protectable Interest.

References

Ala. Code § 8-1-190(b)(5) (1975) (West's Alabama Code).

**APJI 9.06 RESTRICTIVE COVENANT—NON-
COMPETE AGREEMENT—
DISSOLUTION OF A BUSINESS
ALA. CODE § 8-1-190(B)(6) (1975)
(WEST’S ALABAMA CODE) [PL]**

If you have found the agreement is valid, then you must decide if it is enforceable.

(Name of plaintiff) can enforce a non-compete agreement in connection with the dissolution of a business only if (he/she/it) proves to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) and (name of defendant) were (partners/owners/members) of (name of business);

2. That (name of plaintiff) and (name of defendant) agreed that they would not carry on similar commercial activity within (state the geographic area); and,

3. That before the business dissolved, it conducted the commercial activity in the entire geographic area covered by the covenant.

If (name of plaintiff) proved these three elements, (he/she/it) must prove four additional elements before you can find for (him/her/it). These elements are:

1. The agreement must preserve a protectable interest;

2. The agreement’s restriction is reasonably necessary to preserve that protectable interest;

3. (Name of defendant) breached the agreement; and,

4. The breach harmed (name of plaintiff).

If (name of plaintiff) did not prove these four elements, you must find for (name of defendant).

If (name of plaintiff) proved these elements, you must

APJI 9.06**ALABAMA PATTERN JURY INSTRUCTIONS**

find for (him/her/it), and then you must determine an amount to award (him/her/it) as damages.

Approved November 9, 2018

Notes on Use

See APJI 9.07, Protectable Interest.

References

Ala. Code § 8-1-190(b)(6) (1975) (West's Alabama Code).

**APJI 9.07 PROTECTABLE INTEREST—
DEFINED**

**ALA. CODE § 8-1-191 (1975) (WEST'S
ALABAMA CODE) [PL]**

To recover, (name of plaintiff) must reasonably satisfy you from the evidence that (his/her/its) (describe the restrictive covenant) is reasonably necessary to preserve a protectable interest.

(Name of plaintiff) may have a protectable interest in:

(Trade secrets from being disclosed or used.)

OR

(Confidential information from being disclosed or used improperly.)

OR

(Commercial relationships or contacts with specific prospective or existing customers, patients, vendors, or clients.)

OR

(Customer, patient, vendor, or client goodwill associated with an ongoing business, franchise, commercial, or professional practice, or trade dress.)

OR

(Customer, patient, vendor, or client goodwill associated with a specific marketing or trade area.)

OR

(Certain specialized and unique training paid for by (name of plaintiff).)

You must determine if (name of plaintiff) proved that (his/her/its) covenant is reasonably necessary to preserve a protectable interest.

If (name of plaintiff) did not prove that the covenant is reasonably necessary to preserve a protectable interest, you must find for (name of defendant).

If (name of plaintiff) proved the covenant is reasonably necessary to preserve a protectable interest, you will follow the other instructions I will give you.

Approved January 11, 2019

Notes on Use

Ala. Code §§ 8-1-190 to 197 (1975) (West's Alabama Code) do not define the terms listed in § 8-1-191. However, the user should refer to the instructions in APJI Chapter 44, Trade Secrets.

The trial judge should instruct on only the alternatives presented by substantial evidence.

See APJI 9.08, Protectable Interest—Specialized Training.

References

Ala. Code § 8-1-191 (1975) (West's Alabama Code).

**APJI 9.08 PROTECTABLE INTEREST—
SPECIALIZED TRAINING ALA.
CODE § 8-1-191(A)(5) (1975) (WEST’S
ALABAMA CODE) [PL]**

(Name of plaintiff) says (he/she/it) gave (name of defendant) specialized training, and it is a protectable interest. (Name of defendant) says (state the elements, or portions of elements, the defendant disputes).

A general reference in the agreement to “training” or “specialized and unique training” is not enough to prove a protectable interest.

(Name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That the training was specialized;
2. That the training was unique;
3. That the agreement specifically identified the training;
4. That the training was specifically directed to (name of defendant);
5. That the training was the consideration for the agreement; and
6. That (name of plaintiff) spent substantial company money when (he/she/it) gave this training to (name of defendant).

If (name of plaintiff) proved these six elements, you must find that (he/she/it) had a protectable interest in the training (he/she/it) gave (name of defendant).

If (name of plaintiff) did not prove these elements, you must find for (name of defendant).

Approved February 8, 2019

Notes on Use

The statute contemplates that “specialized and unique training” was given to an employee, but the statute does not define “specialized and unique training.” The terms must await definition by the legislature or Alabama appellate courts. Ala. Code § 8-1-197 (1975) (West’s Alabama Code) states this article “expresses fundamental public policies of the state of Alabama,” and foreign law that violates Alabama public policy will not be applied although otherwise applicable.

“Specialized and unique training . . . specifically directed to a particular employee may form the basis for a protectable interest . . .” Ala. Code § 8-1-191, Ala. cmt. The sub-section contemplates “the contract must set forth in writing the exact training and the anticipated expense of such training in order for the training to form the basis of a protectable interest.” *Id.*

Ala. Code § 8-1-191 (b) states, “[j]ob skills in and of themselves, without more, are not protectable interests.”

References

Chavers v. Copy Products Co., Inc., of Mobile, 519 So. 2d 942 (Ala. 1988).

Greenlee v. Tuscaloosa Office Products and Supply, Inc., 474 So. 2d 669 (Ala. 1985).

DeVoe v. Cheatham, 413 So. 2d 1141 (Ala. 1982).

West’s Key Number Digest, Contracts ¶¶115, 116, 116(1), 116(2).

3 Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks and Monopolies* § 16:32 n. 7 (4th ed. Dec. 2018).

Stephen P. Pope & Scott H. Dunham, *Avoiding and Defending Wrongful Discharge Claims* § 2:17 (July 2018).

Restatement (Second) of Contracts § 188 cmt. B (1979).

Jeffrey T. Rickman, *Noncompete Clauses in Georgia: An Economic Analysis*, 21 Ga. St. U. L. Rev. 1107, 1120—23 (Summer, 2005).

Frank J. Cavico, "Extraordinary or Specialized Training" as a "Legitimate Business Interest" in Restrictive Covenant Employment Law: Florida and National Perspectives, 14 St. Thomas L. Rev. 53 (Fall, 2001).

**APJI 9.09 PROTECTABLE INTEREST—
CONFIDENTIAL INFORMATION
ALA. CODE § 8-1-191(A)(2) (1975)
(WEST’S ALABAMA CODE) [PL]**

(Name of plaintiff) has a protectable interest in confidential information. (He/she/it) says (describe the information) was confidential.

Before you can find the information confidential, (name of plaintiff) must reasonably satisfy you from the evidence:

1. That the information was:

(Pricing information and methodology;

Compensation;

Customer lists;

Customer data and information;

Mailing lists;

Prospective customer information;

Financial and investment information;

Management and marketing plans;

Business strategy, technique, and methodology;

Business models and data;

Processes and procedures;

Company files;

Software;

Computer code;

Business reports;

Business documents;

Business manuals;

Business forms;

Other information.)

2. That the information (name of plaintiff) claims to own must have been used in (his/her/its) (business/commercial activity);

3.) That (name of plaintiff) must have treated the information as confidential.

It does not matter how (name of plaintiff) stored or preserved the materials containing the confidential information. For example, it could be in writing or stored electronically.

However, (name of plaintiff) must have taken reasonable steps to limit access to the information to certain people who had a duty to keep the information private: and,

4.) That (name of plaintiff) kept the information private or confidential.

Just because the information has a label or some other designation on the document that states the contents are confidential does not make it confidential information. Instead, (name of plaintiff) must have kept information private or confidential.

If (name of plaintiff) proved these elements, you will find (he/she/it) had a protectable interest in the information, and then you will follow the other instructions I give you.

If (name of plaintiff) did not prove all these elements, you must find for (name of defendant).

Approved January 11, 2019

Notes on Use

Ala. Code § 8-1-191(2) lists types of information that are confidential. However, the list is not exclusive. The trial judge should instruct only on the type of information at issue in the case.

Ala. Code § 8-1-191(1) states: “Trade secrets, as defined in [§] 8-27-2” is a protectable interest. The user should refer to APJI Chapter 44 on trade secrets.

Under Ala. Code § 8-1-191(5), specialized training is a protectable interest if it satisfies specific requirements. See APJI 9.08, Protectable Interest—Specialized Training.

References

Ala. Code § 8-1-191(a)(2) (1975) (West’s Alabama Code).

**APJI 9.10 UNDUE HARDSHIP—AFFIRMATIVE
DEFENSE
ALA. CODE § 8-1-194 (1975) (WEST’S
ALABAMA CODE) [PL]**

(Name of defendant) says the agreement is an undue hardship on (him/her). This is an affirmative defense, and (name of defendant) must prove it.

A hardship is undue if it prevents (name of defendant) from supporting (himself/herself) and/or (his/her family).

To determine if (name of defendant) proved this defense, you may consider the following factors:

Whether enforcing the agreement would allow (name of defendant) to be gainfully employed.

Whether (he/she) is trained to work in any area other than the one (name of plaintiff) is trying to restrict.

Whether (name of defendant) would be required to learn a new job skill to remain employed.

(His/her) age.

(His/her) family support obligations.

The length of the agreement compared to how long (name of defendant) worked for (name of plaintiff).

The length of the agreement compared to how long (name of defendant) has worked in (his/her) field of employment.

The extent to which the agreement would prevent (name of defendant) from using (his/her) knowledge, skills and know how (he/she) obtained from any source other than (name of plaintiff).

These factors are just examples of what you may consider. (Name of defendant) need not prove every one of

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these factors. But, (he/she) must prove to your reasonable satisfaction that enforcement of the agreement is an undue hardship on (name of defendant).

If you find that enforcing the agreement would cause (name of defendant) an undue hardship, you must find for (name of defendant).

Approved February 8, 2019

Notes on Use

References

Ala. Code § 8-1-194 (1975) (West's Alabama Code).

King v. Head Start Family Hair Salons, Inc., 886 So. 2d 769 (Ala. 2004).

Chavers v. Copy Products Co., Inc., of Mobile, 519 So. 2d 942 (Ala. 1988).

Calhoun v. Brendle, Inc., 502 So. 2d 689, 694 (Ala. 1986).

Greenlee v. Tuscaloosa Office Products and Supply, Inc., 474 So. 2d 669 (Ala. 1985).

West's Key Number Digest, Contracts ¶¶116, 116(1).

**APJI 9.11 PROTECTABLE INTERESTS—JOB
SKILLS [PL]**

(Name of defendant) says (name of plaintiff) does not have a protectable interest and cannot enforce the agreement. (Name of defendant) says (name of plaintiff) is only attempting to prevent (name of defendant) from using (his/her) job skills.

If you find from the evidence that the only purpose of the agreement is to prevent (name of defendant) from using (his/her) job skills, you must find for (name of defendant).

If you are reasonably satisfied the agreement is reasonably necessary to preserve a protectable interest, you will follow the other instructions I will give you.

Approved February 8, 2019

Notes on Use

Ala. Code § 8-1-191(b) (1975) (West's Alabama Code) states: "Job skills in and of themselves, without more, are not protectable interests."

References

Greenlee v. Tuscaloosa Office Products and Supply, Inc., 474 So. 2d 669 (Ala. 1985).

DeVoe v. Cheatham, 413 So. 2d 1141 (Ala. 1982).

West's Key Number Digest, Contracts ☞116(1).

**APJI 9.12 PROFESSIONAL’S EXEMPTION—
DEFENSIVE
ALA. CODE § 8-1-196 (1975) (WEST’S
ALABAMA CODE) [PL]**

Alabama Code § 8-1-196 (1975) (West’s Alabama Code) states:

“Nothing in this article shall be construed to eliminate any professional exemption recognized by Alabama law.”

Approved March 1, 2019

Notes on Use

The Committee is unaware of any Alabama appellate court opinion that reports a jury decided a person was or was not a professional. For this reason, the Committee believes a jury instruction on this point unnecessary.

Ala. Code § 8-1-190(a) (1975) (West’s Alabama Code) states, in part:

“Every contract by which anyone is restrained from exercising a lawful profession, . . . of any kind otherwise than is provided by this section is **to that extent** void.” (emphasis supplied).

“It is well settled in Alabama that to the extent a contract restrains the practice of a lawful profession, it is void, under § 8-1-1(a), as against public policy.” *Anniston Urologic Associates, P.C. v. Kline*, 689 So. 2d 54, 56 (Ala. 1997). “Contracts restraining employment are looked upon with disfavor because they tend not only to deprive the public of efficient service, but tend to impoverish the individual.” *Robinson v. Computer Servicenters, Inc.*, 346 So. 2d 940, 943 (Ala. 1977).

The party that seeks to enforce the restraint has the burden of proof on every element of an enforceable covenant, including the restrictive covenant is not void. *Section 8-1-194. Construction Materials, Ltd., Inc. v. Kirkpatrick Concrete, Inc.*, 631 So. 2d 1006, 1009 (Ala. 1994); *Benchmark Medical Holdings, Inc. v. Barnes*, 328 F. Supp. 2d 1236, 1243 (M.D. Ala. 2004). The defendant must interject the professional’s exemption as a defense to the plaintiff’s

claim that the defendant has breached enforceable restrictive covenants in a contract. See Ala. Code § 8-1-196.

Benchmark Medical Holdings, Inc. v. Barnes, 328 F. Supp. 2d 1236 (M.D. Ala. 2004) contains a thorough analysis of the application of the professional's exemption.

The factors listed below are often referred to as the “Friddle factors” as outlined in *Friddle v. Raymond*, 575 So. 2d 1038 (Ala. 1991). See *G.L.S. & Associates v. Rogers*, 155 So. 3d 263, 269 (Ala. Civ. App. 2014) (“[T]he inquiry whether a particular occupation is a profession requires evidence relevant to the Friddle factors.”).

To determine if the defendant's occupation is a profession, the trier of fact may consider the following factors.

1. Whether the defendant's occupation requires special knowledge, skills, education, or training.
2. Whether the defendant's customers or clients rely on him or her as a trusted adviser.
3. Whether customers or clients reveal confidential or private information about their business or personal lives in connection with the services the defendant provides.
4. Whether the defendant has a duty of loyalty to act in the best interests of his or her customers or clients.
5. Whether the defendant is called upon to make instant decisions for his or her customers or clients.
6. Whether the defendant uses independent discretion and judgment in providing services for his or her customers or clients.
7. Whether the defendant performs a public service.
8. Whether the defendant's occupation requires him or her to get special licensing or have special qualifications.
9. Whether the defendant is required to receive continuing education to keep his or her licensing.

References

Anniston Urologic Associates, P.C. v. Kline, 689 So. 2d 54 (Ala. 1997) (doctors are professionals).

Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston, 678 So. 2d 765 (Ala. 1996) (lawyers are professionals).

Friddle v. Raymond, 575 So. 2d 1038 (Ala. 1991) (veterinarians are professionals).

Alabama Bd. of Optometry v. Eagerton, 393 So. 2d 1373 (Ala. 1981) (optometry is not a profession).

Burkett v. Adams, 361 So. 2d 1 (Ala. 1978) (plurality opinion) (public accountants are professionals).

Gant v. Warr, 286 Ala. 387, 240 So. 2d 353 (1970) (certified public accountants are professionals).

Odess v. Taylor, 282 Ala. 389, 211 So. 2d 805 (1968) (per curiam) (physicians are professionals).

G.L.S. & Associates v. Rogers, 155 So. 3d 263 (Ala. Civ. App. 2014) (inquiry of whether an occupation is a profession requires evidence of Friddle factors).

Dobbins v. Getz Exterminators of Alabama, Inc., 382 So. 2d 1135 (Ala. Civ. App. 1980) (pest control is not a profession).

Benchmark Medical Holdings, Inc. v. Barnes, 328 F. Supp. 2d 1236 (M.D. Ala. 2004) (physical therapists are professionals).

West's Key Number Digest, Contracts Ⓔ115, 116, 116(1), 117(1).

APJI 9.13 DAMAGES—INTRODUCTION [PL]

(Name of plaintiff)'s claim is (name of defendant) breached (describe the restrictive agreement).

If (name of plaintiff) did not prove (name of defendant) breached the agreement, you must find for (name of defendant), and you do not consider damages.

If (name of plaintiff) proved (name of defendant) breached the agreement, you must then decide how much money to award (name of plaintiff) on that claim. The money you award is called damages.

Approved February 8, 2019

Notes on Use

See APJI 11.00, Introduction.

References

Ala. Code § 8-1-195(a)(2) (1975) (West's Alabama Code).

APJI 9.14 ACTUAL DAMAGES [PL]

Actual damages are awarded to fairly and reasonably compensate (name of plaintiff) for (his/her/its) actual loss caused by (name of defendant)'s breach of the agreement.

One type of actual damages is the expected loss of future business profits. Before you can award (name of plaintiff) this type damages, (he/she/it) must:

1. Prove the loss by evidence that gives you a basis to calculate, with reasonable certainty, the amount of the lost profits; and,
2. Prove that (name of defendant)'s breach of the agreement caused the loss.

(Name of plaintiff) must prove these elements to your reasonable satisfaction from the evidence.

You cannot award damages against (name of defendant) for any loss that was not caused by (his/her) conduct. (He/she) is not responsible for damages when (name of plaintiff) loses business to (name of defendant's new employer) if (name of defendant) did not cause the loss, or the loss resulted from the efforts of others.

Approved February 8, 2019

Notes on Use

See APJI 10.36, Damages—General Rule (Contract).

See APJI 11.01, Compensatory Damages.

See APJI 11.40, Loss of Profits—New or Unestablished Business.

References

Ala. Code § 8-1-195(a)(2) (1975) (West's Alabama Code).

Corson v. Universal Door Systems, Inc., 596 So. 2d 565, 571

(Ala. 1991) reh'g denied (Ala. Mar.27, 1992). Actual damages come in forms other than lost profits.

James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc., 434 So. 2d 1380, 1385 (Ala. 1983).

West's Key Number Digest, Damages ☞124(3), 147, 159(4), 176.

West's Key Number Digest, Labor and Employment ☞324.

Jenelle Mims Marsh, Alabama Law of Damages § 17:13 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 17, 136.

**APJI 9.15 DAMAGES—BREACH OF CONTRACT
[PL]**

Damages for breach of the agreement should return (name of plaintiff) to the position (he/she/it) would have been in had (name of defendant) fully performed the agreement.

These damages are generally those that flow naturally from the breach.

Approved February 8, 2019

Notes on Use

See APJI 10.36, Damages—General Rule.

References

Ala. Code § 8-1-195(3) (1975) (West's Alabama Code).

Smalley Transp. Co., Inc. v. Bay Dray, Inc., 612 So. 2d 1182, 1186–87 (Ala. 1992).

Brendle Fire Equipment, Inc. v. Electronic Engineers, Inc., 454 So. 2d 1032 (Ala. Civ. App. 1984).

West's Key Number Digest, Damages ☞ 117 to 126, 139.5 to 140.

Jenelle Mims Marsh, Alabama Law of Damages 17:1, 17:13 (6th ed. 2012).

**APJI 9.16 LIQUIDATED DAMAGES [PL]
(CAUTION—READ NOTES ON USE)**

The agreement calls for a specific amount of damages if (name of defendant) breached the agreement. This type of damages is called liquidated damages.

If you find (name of defendant) breached the agreement, you will award damages in the specific amount stated in the agreement.

Approved February 8, 2019

Notes on Use

If the defendant raises the issue, the trial judge must first determine if the liquidated damages provision is valid.

Use this instruction when the agreement contains a liquidated damages provision, and there is no issue whether it calls for liquidated damages or a penalty, or the trial judge determines the provision calls for liquidated damages.

References

Ala. Code § 8-1-195(2) (1975) (West's Alabama Code).

Camelot Music, Inc. v. Marx Realty & Imp. Co., Inc., 514 So. 2d 987, 990 (Ala. 1987). “The courts generally identify three criteria by which a valid liquidated damages clause may be distinguished from a penalty. First, the injury caused by the breach must be difficult or impossible to accurately estimate; second, the parties must intend to provide for damages rather than for a penalty; and, third, the sum stipulated must be a reasonable pre-breach estimate of the probable loss. See, C. Gamble and D. Corley, Alabama Law of Damages, § 5-4 (1982). Determining whether a liquidated damages provision is valid is a question of law to be determined by the trial court based on the facts of each case.”

West's Key Number Digest, Damages ☞74, 75, 79, 79(1), 83.

Jenelle Mims Marsh, Alabama Law of Damages §§ 5:3, 5:4 (6th ed. 2012).

APJI 9.17 NOMINAL DAMAGES [PL]

Nominal damages are a small amount of money you will award (name of plaintiff) if you are reasonably satisfied from the evidence:

1. (Name of defendant) breached the agreement;
2. The breach caused (name of plaintiff) harm; but,
3. (Name of plaintiff) did not prove the amount you should award.

A nominal damage award is, for example, \$1.00.

Approved November 9, 2018

Notes on Use

See APJI 11.02, Nominal Damages.

References

Corson v. Universal Door Systems, Inc., 596 So. 2d 565, 571 (Ala. 1991) (Non-solicitation).

James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc., 434 So. 2d 1380, 1385 (Ala. 1983) (Non-compete and non-solicit).

Roberson v. C.P. Allen Const. Co., Inc., 50 So. 3d 471 (Ala. Civ. App. 2010) (Non-compete and tortious interference).

West's Key Number Digest, Damages ¶8 to 14.

Jenelle Mims Marsh, Alabama Law of Damages §§ 3:1, 3:3 (6th ed. 2012).

Ala. Code § 8-1-195(a)(2) (1975) (West's Alabama Code).

Chapter 10

Contracts [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 10.00 Introduction [PL]
- APJI 10.01 Elements of Contract [PL]
- APJI 10.02 Offer [PL]
- APJI 10.03 Acceptance [PL]
- APJI 10.04 Consideration [PL]
- APJI 10.05 Mutual Assent [PL]
- APJI 10.06 Implied Contract [PL]
- APJI 10.07 Oral Contracts [PL]
- APJI 10.08 to 10.12 Reserved
- APJI 10.13 Action for Breach—Elements [PL]
- APJI 10.14 Issues—Contract Admitted—Counterclaim [PL]
- APJI 10.15 Action for Breach of Implied Warranty of Fitness and Habitability—Elements [PL]
- APJI 10.16 Action for Interference with Contract [PL]
- APJI 10.17 Action for Interference with Business Relationship [PL]
- APJI 10.18 Quasi-Contract—Elements [PL]
- APJI 10.19 Partial Performance—Definition [PL]
- APJI 10.20 Quantum Meruit—Definition [PL]
- APJI 10.21 to 10.22 Reserved
- APJI 10.23 Justification Defense [PL]
- APJI 10.24 Competitor's Privilege Defense [PL]
- APJI 10.25 Fraud as a Defense [PL]
- APJI 10.26 Undue Influence as a Defense [PL]
- APJI 10.27 Duress as a Defense [PL]
- APJI 10.28 Economic Duress—Business Compulsion as a Defense [PL]
- APJI 10.29 Substantial Performance [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

- APJI 10.30 to 10.34 Reserved
- APJI 10.35 Damages—Substantial Performance [PL]
- APJI 10.36 Damages—General Rule [PL]
- APJI 10.37 Prejudgment Interest on Damages for Breach [PL]
- APJI 10.38 Damages—Mental Anguish and Suffering [PL]
- APJI 10.39 Damages—Partial Performance [PL]
- APJI 10.40 Damages—Interference with Contract or Business Relationship [PL]
- APJI 10.41 to 10.46 Reserved
- APJI 10.47 Good Faith and Fair Dealing [PL]
- APJI 10.48 Time for Performance [PL]
- APJI 10.49 Interpretation [PL]
- APJI 10.50 Novation [PL]
- APJI 10.51 to 10.55 Reserved
- APJI 10.56 Non-Performance—Excuses [PL]

Chapter 10 Conversion Chart

Title of Instruction	Third Edition Instruction Number	Second Edition Instruction Number
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Elements of Contract	10.01	10.02
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Consideration	10.04	10.03
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Implied Contracts	10.06	10.08
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APJI 10.00 INTRODUCTION [PL]

Plaintiff (name of plaintiff) says that (he/she/it) and Defendant (name of defendant) entered into a contract for (insert brief summary of alleged contract).

(Name of plaintiff) says that (name of defendant) breached or broke this contract by (briefly state the alleged breach).

(Name of defendant) denies (insert denial of any of the above claims). (Name of defendant) also says (insert affirmative defense).

Notes on Use

Use this instruction to introduce the jury to the issues involved in the case.

The subject of contracts is necessarily broad. The Committee has drafted pattern instructions that address some of the more common issues in this broad field. Issues of contract formation, interpretation and enforcement are addressed. The Committee did not prepare instructions on specific contract formation issues because these issues are rarely presented for jury resolution. The Committee drafted instructions on more common issues related to performance of contractual duties, excuses for nonperformance, and breaches of contract.

APJI 10.01 ELEMENTS OF CONTRACT [PL]

Plaintiff (name of plaintiff) says that the parties had a contract. A contract is an agreement to do or not to do a certain thing.

To prove there was a contract, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

That there was an offer;

That there was an acceptance;

That there was consideration; and

That there was mutual assent to the terms.

Notes on Use

This instruction should be followed by a definition of those elements in dispute. See APJI 10.02 Offer; APJI 10.03 Acceptance; APJI 10.04 Consideration; and APJI 10.05 Mutual Assent.

References

Avis Rent A Car Systems, Inc. v. Heilman, 876 So. 2d 1111 (Ala. 2003).

Ex parte Grant, 711 So. 2d 464, 465 (Ala. 1997). The requisite elements of a valid contract include: an offer and an acceptance, consideration, and mutual assent to terms essential to the formation of a contract.

Strength v. Alabama Dept. of Finance, Div. of Risk Management, 622 So. 2d 1283 (Ala. 1993) (requisite elements, generally, of an insurance policy).

West's Key Number Digest, Contracts ☞1.1.

Am. Jur. 2d, Contracts § 1.

Robert R. O'Haver, The Economics of Breach of Contract Litigation: A Case Study, 4 J. Legal Econ. 89 (Summer 1994).

John Barclay Phillips, Out with the Old: Abandoning the

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Traditional Measurement of Contract Damages for a System of Comparative Fault, 50 Ala. L. Rev. 911 (1999).

Michael David Strasavich, Court-Ordered Attorney's Fees in Contract Actions: What is Reasonable?, 19 J. Legal Prof. 301 (1994).

Steven F. Thompson, Contracts To Split Lottery Prizes: What Happens When the Ticket Is a Winner?, 18 Am. J. Trial Advoc. 201 (Summer 1994).

Jason D. Woodard, Employment Contracts Between Lawyers and Law Firms, 24 J. Legal Prof. 529 (2000).

APJI 10.02 OFFER [PL]

An offer proposes the terms of a contract to the other party. The party making the offer must intend to be bound by its terms, if the proposal is accepted.

Notes on Use

Use this instruction in any case when a definition of an offer is required. If the existence of an offer is not an issue, this instruction is unnecessary.

References

West's Key Number Digest, Contracts ☞16, 18, 19.

1 Samuel L. Williston & Richard A. Lord, A Treatise on The Law of Contracts § 4:4 (4th ed. 1990).

Am. Jur. 2d, Contracts § 47.

Restatement (Second) of Contracts § 24 (1979).

A.L.R. Library

Advertisement addressed to public relating to sale or purchase of goods at specified price as an offer the acceptance of which will consummate a contract, 43 A.L.R.3d 1102.

Oral acceptance of written offer by party sought to be charged as satisfying statute of frauds, 30 A.L.R.2d 972.

APJI 10.03 ACCEPTANCE [PL]

An acceptance of an offer is a statement or conduct showing that the party agrees to all the terms of the offer and intends to be bound by those terms.

Notes on Use

Use this instruction when a definition of acceptance is required. If acceptance of an offer is not an issue, this instruction is unnecessary.

References

Gerstenecker v. Gerstenecker, 238 So. 3d 646 (Ala. 2017).

Cook's Pest Control, Inc. v. Rebar, 852 So. 2d 730 (Ala. 2002). The conduct of one party to a contract from which the other may reasonably draw an inference of assent to an agreement is effective as acceptance.

Stephenson Brick Co. v. Bessemer Engineering & Construction Co., 218 Ala. 325, 118 So. 570 (1928). Acceptance of a written offer need not be in writing, but it must be identical with the offer, positive, and unambiguous.

West's Key Number Digest, Contracts ¶16, 22.

1 Samuel L. Williston & Richard A. Lord, A Treatise on The Law of Contracts § 6:1 (4th ed. 1990).

Am. Jur. 2d, Contracts § 66.

Black's Law Dictionary (8th ed. 2004).

Restatement (Second) of Contracts § 50 (1981).

A.L.R. Library

Variance between offer and acceptance in regard to title as affecting consummation of contract for sale of real property, 16 A.L.R.3d 1424.

APJI 10.04 CONSIDERATION [PL]

Consideration for a contract is:

(Anything of value promised or received); or

(Doing or promising to do something which one has a right to do); or

(Promising not to do something which one has a right to do).

Notes on Use

Use this instruction when a definition of consideration is required. Select the appropriate alternative language. If consideration is not an issue, this instruction is unnecessary.

References

Clark v. McGinn, 268 Ala. 252, 105 So. 2d 668 (1958).

Roberts v. Lindsey, 242 Ala. 522, 7 So. 2d 82 (1942).

West's Key Number Digest, Contracts ☞47 to 91.

Am. Jur. 2d, Contracts §§ 102 to 176.

Restatement (Second) of Contracts § 71 (1979).

APJI 10.05 MUTUAL ASSENT [PL]

Mutual assent means that all parties to the contract understood and accepted all the essential terms of the contract. Mutual assent is sometimes referred to as a meeting of the minds.

Notes on Use

Use this instruction when a definition of mutual assent is required. If mutual assent is not an issue, this instruction is unnecessary.

References

Lyles v. Pioneer Housing Systems, Inc., 858 So. 2d 226 (Ala. 2003). Assent to a contract must be manifested by something.

Ex parte Grant, 711 So. 2d 464, 465 (Ala. 1997). One of the requisite elements of a contract is mutual assent to terms essential to the formation of the contract.

Board of Com'rs of Alabama State Bar v. Jones, 291 Ala. 371, 281 So. 2d 267 (1973).

West's Key Number Digest, Contracts ⇨15 to 16.

1 Samuel L. Williston & Richard A Lord, A Treatise on The Law of Contracts § 4:1 (4th ed. 1990).

Am. Jur. 2d, Contracts §§ 30 to 34.

A.L.R. Library

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements and the like, of certain commodities, 26 A.L.R.2d 1139.

APJI 10.06 IMPLIED CONTRACT [PL]

Parties can create contracts by their conduct, without spoken or written words. These contracts are just as valid as contracts formed with words. In deciding whether a contract was created, you should consider the conduct and relationship of the parties and all other circumstances. Conduct creates a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.

Notes on Use

Use this instruction in cases that require a definition of an implied in fact contract.

References

Kennedy v. Polar-BEK & Baker Wildwood Partnership, 682 So. 2d 443 (Ala. 1996); Welborn v. Snider, 431 So. 2d 1198 (Ala. 1983). Implied contracts normally arise in situations where there is a bargained-for exchange contemplated by the parties, but there is no overt expression of agreement.

Berry v. Druid City Hospital Bd., 333 So. 2d 796, 799 (Ala. 1976). A contract implied in fact requires the same elements as an express contract, and differs only in “the method of expressing mutual assent.”

West’s Key Number Digest, Contracts ⇨27, Implied and Constructive Contracts ⇨1 et seq.

1 Arthur L. Corbin & Joseph M. Perillo, Corbin on Contracts § 1.20 (Rev’d ed. 1993). “A quasi-contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes against a clear expression of dissent.”

1 Samuel L. Williston & Richard A. Lord, A Treatise on The Law of Contracts § 1:5 (4th ed. 1990).

Am. Jur. 2d, Contracts § 12. “A contract is express if its terms are stated by the parties, either orally or in writing, and it is implied if its terms are not so stated. In other words, an implied

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contract is one in which some or all of the terms are inferred from the conduct of the parties and the circumstances of the case, though not expressed in words, while an express contract is one in which the parties arrive at their agreement and express it in words, either oral or written.”

Am. Jur. 2d, Contracts §§ 12 to 18.

APJI 10.07 ORAL CONTRACTS [PL]

A contract may be written or oral. Oral contracts are just as valid as written contracts.

Notes on Use

Use this instruction when the action is based on an oral contract or a contract partly written and partly oral.

References

Ala. Code § 7-2-201 (1975) (West's Alabama Code). Statute of frauds (contracts for the sale of goods).

Ala. Code § 8-9-2 (1975) (West's Alabama Code). Statute of frauds (general).

Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297 (Ala. 1986). In the absence of a statute requiring a contract to be written or evidenced by writing, a valid contract may be partly written and partly oral.

Keel v. Weinman, 266 Ala. 684, 98 So. 2d 611 (1957).

Air Conditioning Engineers v. Small, 259 Ala. 171, 65 So. 2d 698 (1953).

West's Key Number Digest, Contracts ¶30 to 46.

Am. Jur. 2d, Contracts § 168 (2004).

APJI 10.08 to 10.12**Reserved**

**APJI 10.13 ACTION FOR BREACH—
ELEMENTS [PL]**

A contract is breached or broken when a party does not do what (he/she/it) promised to do in the contract. To recover damages from (name of defendant) for breach of contract, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of plaintiff) and (name of defendant) entered into a contract;
2. That (name of plaintiff) did the things that the contract required (him/her/it) to do;
3. That (name of defendant) failed to do something that the contract required (him/her/it) to do; and
4. That (name of plaintiff) was harmed by that failure.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must decide how much money will reasonably compensate (name of plaintiff). If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Approved October 11, 2013

Notes on Use

Use this instruction in any breach of contract action when the existence of the contract is not in dispute.

References

LNM1, LLC v. TP Properties, LLC, 296 So. 3d 792 (Ala. 2019). The failure to procure required insurance coverages was a material breach of a commercial lease.

Target Media Partners Operating Co., LLC v. Specialty Marketing Corp., 177 So. 3d 843 (Ala. 2013), reh'g denied (2013), reh'g denied (Oct. 17, 2014) (per curiam).

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Crestview Memorial Funeral Home, Inc. v. Gilmer, 79 So. 3d 585 (Ala. 2011).

Southern Medical Health Systems, Inc. v. Vaughn, 669 So. 2d 98, 99, 130 Lab. Cas. (CCH) P 57979 (Ala. 1995). “To prevail on a breach of contract claim, a plaintiff is required to present evidence in support of the following elements of his claim: (1) the existence of a valid contract between the defendants and him; (2) his own performance under that contract; (3) the defendants’ breach, or failure to perform under the contract; and (4) damage sustained as a result of the defendants’ nonperformance.”

West’s Key Number Digest, Contracts ☞312, 315, 324(1) to 324(2), 326, 353.

Am. Jur. 2d, Contracts §§ 590 to 606.

Restatement (Second) of Contracts § 236 (1979).

**APJI 10.14 ISSUES—CONTRACT ADMITTED—
COUNTERCLAIM [PL]**

Defendant (name of defendant) agrees there was a contract and that it was broken. (Name of defendant) says (he/she/it) did not break the contract but the plaintiff (name of plaintiff) broke the contract. You must decide whether either party broke the contract and if so whether the other party was harmed as a result.

Notes on Use

Use this instruction when the existence of contract is not an issue and a counterclaim is filed by the defendant.

**APJI 10.15 ACTION FOR BREACH OF
IMPLIED WARRANTY OF FITNESS
AND HABITABILITY—ELEMENTS
[PL]**

Plaintiff (name of plaintiff) purchased a new residence from defendant (name of defendant). (Name of plaintiff) claims that when (name of defendant) sold the residence to (name of plaintiff), the residence did not comply with the implied warranty of habitability. The implied warranty of habitability for a residence means that the residence is reasonably fit for living quarters. To recover damages from (name of defendant) for breach of the implied warranty of habitability, (name of plaintiff) must prove to your reasonable satisfaction all of the following elements:

1. That (name of plaintiff) purchased a new residence from (name of defendant);
2. That (name of defendant) built the residence or had it built for sale to the public;
3. That the residence had not been lived in by any one else before (name of plaintiff) purchased it;
4. That the residence was sold in a defective condition which impaired the intended use of the residence;
5. That the plaintiff was not aware of the defective condition; and,
6. That (name of plaintiff) was harmed by the defective condition.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must decide how much money will reasonably compensate (name of plaintiff). If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Notes on Use

Use this instruction when the claim is an alleged breach of the implied warranty of fitness and habitability in the sale of a newly constructed residence by a builder-vendor to the first purchaser.

References

Sims v. Lewis, 374 So. 2d 298 (Ala. 1979).

Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971).

Carson v. Canales, 409 So. 2d 842 (Ala. Civ. App. 1981).

Cause of Action for Breach of Implied Warranty of Habitability of Residence, 3 Causes of Action 379.

Builder-Vendor's Liability to Purchaser of New Dwelling for Breach of Implied Warranty of Fitness or Habitability, 50 Am. Jur. Proof of Facts 3d 543.

**APJI 10.16 ACTION FOR INTERFERENCE
WITH CONTRACT [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) intentionally interfered with the contract between (him/her/it) and (name of third party). To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That there was a contract between (name of plaintiff) and (name of third party);
2. That (name of defendant) knew about the contract;
3. That (name of defendant) was not a party to the contract, was not an agent of or related to anyone in the contract and had no financial stake in the contract;
4. That (name of defendant) intentionally disrupted or interfered with the performance of this contract; and
5. That (name of plaintiff) was harmed by (name of defendant)'s conduct.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must decide how much money will reasonably compensate (name of plaintiff). If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Notes on Use

Use this instruction when the action is based on an alleged interference with a contract. See APJI 10.17 for an action based on an alleged interference with a business relationship. See APJI 10.40, Damages Interference with Contract or Business Relationship.

White Sands Group, L.L.C. v. PRS II, LLC, 32 So. 3d 5 (Ala. 2009). Justification is an affirmative defense to be pleaded and proved by the defendant. See APJI 10.23, Justification Defense.

References

White Sands Group, L.L.C. v. PRS II, LLC, 32 So. 3d 5 (Ala. 2009). After proving the existence of a contract, it is essential to a claim of tortious interference with contractual relations that the plaintiff establish that the defendant is a third party, i.e., a stranger to the contract with which the defendant allegedly interfered. A defendant is a party in interest to the business or contractual relationship if the defendant has any beneficial or economic interest in, or control over, that relationship.

Tom's Foods, Inc. v. Carn, 896 So. 2d 443 (Ala. 2004).

Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1153 (Ala. 2003), as modified on denial of reh'g, (Sept. 5, 2003). The plaintiff must first demonstrate the existence of a contract or a business relationship between the plaintiff and a third party.

BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So. 2d 203, 212 n.5 (Ala. 2001). "[I]t is illogical to continue to list an absence of justification as one of the elements of the plaintiff's cause of action and then to place the burden on the defendant to disprove it."

Hickman v. Winston County Hosp. Bd., 508 So. 2d 237, 107 Lab. Cas. (CCH) P 55794 (Ala. 1987).

Lolley v. Howell, 504 So. 2d 253, 255 (Ala. 1987). "[A] party to a contract cannot, as a matter of law, be liable for tortious interference with the contract."

Lowder Realty, Inc. v. Odom, 495 So. 2d 23 (Ala. 1986), overruled in part, State Farm Fire and Cas. Co. v. Owen, 729 So. 2d 834 (Ala. 1998) (in a fraudulent suppression action whether a party has a duty to disclose information is a question of law).

West's Key Number Digest, Torts ⇨210 to 286.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 26.00 to 26.10 (5th ed. 2010).

**APJI 10.17 ACTION FOR INTERFERENCE
WITH BUSINESS RELATIONSHIP
[PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) intentionally interfered with the business relationship between (him/her/it) and (name of third party). To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That there was a business relationship between (name of plaintiff) and (name of third party);

2. That (name of defendant) knew about the business relationship;

3. That (name of defendant) was not a party to the business relationship, was not an agent of or related to anyone in the relationship and had no financial stake in the business relationship;

4. That (name of defendant) intentionally disrupted or interfered with the business relationship; and

5. That (name of plaintiff) was harmed by (name of defendant)'s conduct.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must decide how much money will reasonably compensate (name of plaintiff). If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Notes on Use

Use this instruction when the action is based on an alleged interference with a business relationship. See APJI 10.16 for an action based on an alleged interference with a contract. See APJI 10.40, Damages Interference with Contract or Business Relationship.

Justification is an affirmative defense to be pleaded and proved

by the defendant. *White Sands Group, L.L.C. v. PRS II, LLC*, 32 So. 3d 5 (Ala. 2009). See APJI 10.23, Justification Defense.

References

White Sands Group, L.L.C. v. PRS II, LLC, 32 So. 3d 5 (Ala. 2009) overruled *Soap Co. v. Ecolab, Inc.*, 646 So. 2d 1366 (Ala. 1994) to the extent that Ecolab held lack of justification was an element of the plaintiff's prima facie case. White Sands also restated the elements of the plaintiff's prima facie case, as follows: "(1) the existence of a protectable business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage." *White Sands* at 14. A defendant is a party in interest to the business relationship if the defendant has any beneficial or economic interest in, or control over, that relationship.

Tom's Foods, Inc. v. Carn, 896 So. 2d 443 (Ala. 2004).

Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1153 (Ala. 2003), as modified on denial of reh'g, (Sept. 5, 2003). The plaintiff must first demonstrate the existence of a contract or a business relationship between the plaintiff and a third party.

BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So. 2d 203, 212 n.5 (Ala. 2001). "[I]t is illogical to continue to list an absence of justification as one of the elements of the plaintiff's cause of action and then to place the burden on the defendant to disprove it."

Ex parte Alabama Dept. of Transp., 764 So. 2d 1263 (Ala. 2000). Defining the cause of action to apply to a "business relation" as well as a "contractual relation" allows a plaintiff a remedy in the situation where a defendant has intentionally interfered with a prospective contract as well as when he has interfered with an existing contract.

Hickman v. Winston County Hosp. Bd., 508 So. 2d 237, 107 Lab. Cas. (CCH) P 55794 (Ala. 1987).

Lowder Realty, Inc. v. Odom, 495 So. 2d 23 (Ala. 1986), overruled in part, *State Farm Fire and Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998) (in a fraudulent suppression action whether a party has a duty to disclose information is a question of law).

Edwards v. Prime, Inc., 602 F.3d 1276, 1302, 108 Fair Empl. Prac. Cas. (BNA) 1749, 15 Wage & Hour Cas. 2d (BNA) 1862, R.I.C.O. Bus. Disp. Guide (CCH) P 11835 (11th Cir. 2010).

West's Key Number Digest, Torts ☞210 to 286.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 26.00 to 26.10 (5th ed. 2010).

**APJI 10.18 QUASI-CONTRACT—ELEMENTS
[PL]**

Plaintiff (name of plaintiff) claims defendant (name of defendant) owes (him/her/it) damages, because their contract was implied in law even though they did not formally agree in writing or in speech. An implied-in-law contract is a quasi-contract.

To prove this quasi-contract, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff) provided something of value (describe the thing of value) to (name of defendant);
2. At either the (express/implied) request of (name of defendant);
3. Under circumstances where fairness requires that (name of plaintiff) be compensated; and
4. Compensation is necessary to prevent (name of defendant) from being unjustly enriched at (name of plaintiff)'s expense.

If you decide that (name of plaintiff) has proved all these things, you must find for (name of plaintiff) and then you must decide how much money will reasonably compensate (name of plaintiff). The purpose of such damages is to give (name of plaintiff) the reasonable value of the benefit received by (name of defendant). If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Notes on Use

Use this instruction in cases requiring a definition or explanation of quasi contract.

A quasi contract is an obligation similar in character to a contract, which arises not from an agreement of the parties but

from some relation between them or from a voluntary act of one of them, and may be said to be an obligation springing from voluntary and lawful acts of the parties in the absence of any agreement. Contracts implied in law, more properly termed quasi or constructive contracts, are fictions of the law, actually not contracts, created on principles of unjust enrichment and presumption of performance of duty, without regard to assent of the parties. Under appropriate circumstances, such a contract is implied in law for work and labor done at the request of another, for money paid by mistake, for money received for another, for money paid at the request of another, or under such other circumstances as dictated by reason and justice.

References

Mantiplay v. Mantiplay, 951 So. 2d 638, 656 (Ala. 2006) (citing *Green v. Hospital Bldg. Authority of City of Bessemer*, 294 Ala. 467, 470, 318 So. 2d 701, 704 (1975). "There are two kinds of implied contracts—those implied in fact and those implied in law. Contracts implied in law are more properly described as quasi or constructive contracts where the law fictitiously supplies the promise [to pay for the labor or services of another] to prevent a manifest injustice or unjust enrichment, etc."

Ex parte AmSouth Mortg. Co., Inc., 679 So. 2d 251 (Ala. 1996).

Vardaman v. Florence City Bd. of Educ., 544 So. 2d 962, 54 Ed. Law Rep. 757 (Ala. 1989). The existence of an express contract on a given subject generally excludes an implied agreement on the same subject.

Hendrix, Mohr & Yardley, Inc. v. City of Daphne, 359 So. 2d 792, 795 (Ala. 1978). "It is the settled law of this State that where one knowingly accepts services rendered by another, and the benefit and the result thereof, the law implies a promise on the part of the one accepting with knowledge the services rendered by another to pay the reasonable value of such services rendered."

Cowan v. Martin & Huckaby, 246 Ala. 378, 20 So. 2d 769 (1945).

Jordan v. Mitchell, 705 So. 2d 453 (Ala. Civ. App. 1997). Quasi contracts are legal obligations arising, without reference to assent of obligor, from receipt of a benefit retention of which is unjust, and requiring obligor to make restitution.

West's Key Number Digest, Implied and Constructive Contracts ¶2.1.

APJI 10.18**ALABAMA PATTERN JURY INSTRUCTIONS**

Am. Jur. 2d, Restitution and Implied Contracts § 2.

Black's Law Dictionary (8th ed. 2004).

**APJI 10.19 PARTIAL PERFORMANCE—
DEFINITION [PL]**

There has been partial performance of a contract when part of the contract has been completed but the contract was not substantially completed.

Notes on Use

Use this instruction in cases primarily involving building and construction contracts and other cases involving similar principles. See APJI 10.39 for damages on partial performance.

Not to be used in cases under the Uniform Commercial Code.

See APJI 10.29 for definition of substantial performance.

References

Ex parte Woodward Const. & Design, Inc., 627 So. 2d 393, 394 (Ala. 1993). More specifically, in a situation in which the defendant has prevented the plaintiff from performing, our supreme court has stated the following rule: “If the . . . [general contractor] breached an essential and dependent feature of the contract, the . . . [subcontractor] may abandon it and either (1) sue on the contract and recover an amount equal to a proportion of the contract price which he has earned, or (2) sue for work and labor done on a quantum meruit without regard to the price named in the contract.”

Wolfe v. Parham, 18 Ala. 441 (1850). Since the rights of the parties are different if there has been “substantial performance,” partial performance is here defined as excluding substantial performance.

West’s Key Number Digest, Contracts ☞297.

Michael J. Cote, Recovery for Part Performance of Contract, 43 Am. Jur. Proof of Facts 2d 523 (2004).

**APJI 10.20 QUANTUM MERUIT—DEFINITION
[PL]**

Quantum meruit means payment to a plaintiff for as much as he deserves for his labor and services.

Notes on Use

Use this instruction in cases requiring a definition of quantum meruit. Can be used in conjunction with APJI 10.06, Implied Contract, when needed.

References

Mantiply v. Mantiply, 951 So. 2d 638 (Ala. 2006). “In order to succeed on a claim based on a theory of quantum meruit, a plaintiff must show that it had a reasonable expectation of compensation for its services. However, when an express contract exists, an argument based on a quantum meruit recovery in regard to an implied contract fails. The existence of an express contract on a given subject generally excludes an implied agreement on the same subject.”

Brannan & Guy, P.C. v. City of Montgomery, 828 So. 2d 914 (Ala. 2002). Recovery on a theory of quantum meruit arises when a contract is implied.

Utah Foam Products, Inc. v. Polytec, Inc., 584 So. 2d 1345 (Ala. 1991). In order to succeed on a claim based on a theory of quantum meruit, the plaintiff must show that it had a reasonable expectation of compensation for its services.

Hendrix, Mohr & Yardley, Inc. v. City of Daphne, 359 So. 2d 792, 795 (Ala. 1978). “It is the settled law of this State that where one knowingly accepts services rendered by another, and the benefit and the result thereof, the law implies a promise on the part of the one accepting with knowledge the services rendered by another to pay the reasonable value of such services rendered.”

CIT Group/Equipment Financing, Inc. v. Roberts, 885 So. 2d 185 (Ala. Civ. App. 2003).

West’s Key Number Digest, Contracts ¶206.

26 Williston on Contracts § 68:13.

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APJI 10.20

Am. Jur. 2d, Restitution and Implied Contracts § 68:13.

Black's Law Dictionary (8th ed. 2004).

George L. Blum, Limitation to quantum meruit recovery, where attorney employed under contingent-fee contract is discharged without cause, 56 A.L.R.5th 1.

APJI 10.21 to 10.22

Reserved

APJI 10.23 JUSTIFICATION DEFENSE [PL]

Defendant (name of defendant) claims that (his/her/its) conduct was justified. (Name of defendant) must prove to your reasonable satisfaction that (his/her/its) conduct was justified. In deciding whether the conduct was justified, you should consider:

1. The nature of (name of defendant)'s conduct;
2. (Name of defendant)'s motive;
3. The interests of (name of plaintiff) with which (name of defendant)'s conduct interfered;
4. The interests sought to be advanced by (name of defendant);
5. The public's interest in protecting both the freedom of action of (name of defendant) and the contractual interests of (name of plaintiff);
6. The remoteness of (name of defendant)'s conduct to the interference claimed by (name of plaintiff); and,
7. The relationship among (name of plaintiff), (name of third party) and (name of defendant).

If you are reasonably satisfied that the conduct of (name of defendant) was justified, (name of plaintiff) cannot recover.

Notes on Use

Use this instruction after APJI 10.16, Action for Interference with Contract or APJI 10.17 Action for Interference with Business Relationship, when the defendant raises justification as an affirmative defense.

References

White Sands Group, L.L.C. v. PRS II, LLC, 32 So.2d 5 (Ala. 2009).

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Bear Creek Enterprises, Inc. v. Warrior & Gulf Nav. Co., Inc., 529 So. 2d 959 (Ala. 1988).

Hickman v. Winston County Hosp. Bd., 508 So. 2d 237, 107 Lab. Cas. (CCH) P 55794 (Ala. 1987).

Gross v. Lowder Realty Better Homes and Gardens, 494 So. 2d 590 (Ala. 1986).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 26.04 (5th ed. 2010).

Restatement (Second) of Torts § 767 (1979).

**APJI 10.24 COMPETITOR'S PRIVILEGE
DEFENSE [PL]**

The defendant (name of defendant) says (he/she/it) is not liable for (his/her/its) competitor's (name of plaintiff) losses because (his/her/its) conduct was privileged, that is, legally proper. To prove this defense, (name of defendant) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff) and (name of defendant) were in competition with each other;
2. The relationship between (name of plaintiff) and (name of third party) concerns a matter involved in the competition between (name of plaintiff) and (name of defendant);
3. (Name of defendant)'s purpose was at least in part to advance (his/her/its) interest in competing with (name of plaintiff); and
4. (Name of defendant) did not use wrongful means in competing with (name of plaintiff).

If you are reasonably satisfied that the conduct of (name of defendant) was privileged, (name of plaintiff) cannot recover.

Notes on Use

Use this instruction when the defendant raises competitive privilege as a defense. It may be appropriate to give this instruction in conjunction with APJI 10.23, Justification Defense because legitimate economic motives and bona fide business competition are a justification for interfering with a competitor's business.

References

Soap Co. v. Ecolab, Inc., 646 So. 2d 1366, 1369-70 (Ala. 1994), overruled, in part, White Sands Group, L.L.C. v. PRS II, LLC, 32 So.2d 5 (Ala. 2009). White Sands overruled Echolab and other cases "to the extent those cases list the absence of justification as an element of the plaintiff's *prima facie* case." White Sands at 14.

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APJI 10.24

West's Key Number Digest, Torts ⇨ 220, 270 to 276.

Restatement (Second) of Torts § 768 (1977).

APJI 10.25 FRAUD AS A DEFENSE [PL]

Defendant (name of defendant) says (he/she/it) is not bound by the contract because (his/her/its) agreement was obtained by fraud. To prove this defense, (name of defendant) must prove to your reasonable satisfaction all of the following:

1. That (name of plaintiff) stated to (name of defendant) a present or past important fact as true (briefly describe the statement);
2. That (name of plaintiff)'s statement was false;
3. That (name of plaintiff) knew that the statement was false when (he/she/it) made it and (name of defendant) did not know it was false;
4. That (name of plaintiff) made the statement to persuade (name of defendant) to agree to the contract; and,
5. That (name of defendant) would not have entered into the contract if (he/she/it) had known that the statement was false.

If you are reasonably satisfied that the agreement was obtained by fraud, (name of plaintiff) cannot recover.

Notes on Use

Use this instruction where the defense of fraud is claimed as an inducement to enter into the contract.

References

Holcomb v. Beckham, 255 Ala. 206, 51 So. 2d 24 (1951).

Pacific Mut. Life Ins. Co. v. Strange, 223 Ala. 226, 135 So. 477 (1931).

E.T. Gray & Sons v. Satuloff Bros., 213 Ala. 526, 105 So. 666 (1925).

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Barbour v. Poncelor, 203 Ala. 386, 83 So. 130 (1919), receded from in Pierce v. Orr, 540 So. 2d 1364 (Ala. 1989).

Lowery v. Mutual Loan Soc., 202 Ala. 51, 79 So. 389 (1918).

Stone v. Walker, 201 Ala. 130, 77 So. 554 (1917).

West's Key Number Digest, Contracts ¶94, 97, 98.

Am. Jur. 2d, Contracts §§ 214 to 217, 645 to 646.

A.L.R. Library

Illegality as basis for denying remedy of specific performance for breach of contract, 58 A.L.R.5th 387 (2004).

**APJI 10.26 UNDUE INFLUENCE AS A
DEFENSE [PL]**

Defendant (name of defendant) says that (he/she/it) is not bound by the contract because (he/she/it) was unfairly pressured by Plaintiff (name of plaintiff) into agreeing to the contract. To prove this defense, (name of defendant) must prove to your reasonable satisfaction both of the following:

1. That (name of plaintiff) used (a relationship of trust and confidence) ((name of defendant)'s weakness of mind) ((name of defendant)'s needs or distress) to pressure (name of defendant) into agreeing to the contract; and
2. That (name of defendant) would not otherwise have agreed to the contract.

If you are reasonably satisfied that the agreement was obtained by undue influence, (name of plaintiff) cannot recover.

Notes on Use

Use this instruction in any case when the defense of undue influence is raised to invalidate a contract.

References

Thomas v. Davis, 241 Ala. 271, 2 So. 2d 616 (1941).

West's Key Number Digest, Contracts ⚡95 to 98, 353(5).

Am. Jur. 2d, Cancellation of Instruments §§ 25, 26.

Am. Jur. 2d, Contracts §§ 218 to 221.

APJI 10.27 DURESS AS A DEFENSE [PL]

Defendant (name of defendant) says that (he/she/it) is not bound by the contract because (his/her/its) consent was given under duress. To prove this defense, (name of defendant) must prove to your reasonable satisfaction all of the following:

1. That plaintiff (name of plaintiff) (describe the threat or wrongful conduct) to pressure (name of defendant)'s consent to the contract; and
2. As a result of (name of plaintiff)'s conduct (name of defendant) reasonably believed that (he/she/it) had no reasonable alternative except to consent to the contract.

If you are reasonably satisfied that the agreement was obtained by duress, (name of plaintiff) cannot recover.

Notes on Use

Use this instruction when a defense of duress is raised to void a contract or a release.

References

West's Key Number Digest, Contracts ¶95(1) to 95(4).

Am. Jur. 2d, Contracts § 218.

**APJI 10.28 ECONOMIC DURESS—BUSINESS
COMPLUSION AS A DEFENSE [PL]**

Defendant (name of defendant) says (he/she/it) does not have to do the things the contract required (him/her/it) to do because (name of defendant) only gave (his/her/its) consent as a result of Plaintiff's (name of plaintiff)'s economic duress. To prove this defense, (name of defendant) must prove to your reasonable satisfaction all of the following:

1. That (name of plaintiff) (describe the threat or wrongful act);
2. That (name of plaintiff)'s conduct (caused/would have caused) (name of defendant) financial distress (describe the financial distress);
3. That (name of defendant) reasonably believed that (he/she/it) had no reasonable choice except to consent to the contract.

If you are reasonably satisfied that the contract was obtained by economic duress, (name of plaintiff) cannot recover.

Notes on Use

Use this instruction when the defendant seeks to avoid the obligations in a contract because consent to the contract was obtained by economic duress.

Be aware that although the term “wrongful act” is an element of the defendant’s *prima facie* case, *International Paper Co. v. Whilden*, 469 So. 2d 560, 562 (Ala. 1985), the cases use various terms to characterize the wrongful conduct. The terms “wrongful pressure”, “unjustified coercion”, “extortive measures”, “improper or unjustified demands”, and “unlawful or unconscionable pressure” are used.

Economic duress is an affirmative defense. *BSI Rentals, Inc. v. Wendt*, 893 So. 2d 1184 (Ala. Civ. App. 2004).

The doctrine of economic duress or business compulsion is not

an independent tort. *Cahaba Seafood, Inc. v. Central Bank of the South*, 567 So. 2d 1304, 1306 (Ala. 1990).

References

Haston v. Crowson, 808 So. 2d 17 (Ala. 2001) (asset sales agreement).

Green Tree Financial Corp. of Alabama v. Vintson, 753 So. 2d 497 (Ala. 1999).

Newburn v. Dobbs Mobile Bay, Inc., 657 So. 2d 849 (Ala. 1995) (release).

Ponder v. Lincoln Nat. Sales Corp., 612 So. 2d 1169, 1171 (Ala. 1992). “[T]he ‘wrongful act’ prong of the test for economic duress is not satisfied unless the victim has acted in response to unlawful or unconscionable pressure.”

Clark v. Liberty Nat. Life Ins. Co., 592 So. 2d 564, 1992-1 Trade Cas. (CCH) ¶ 69733 (Ala. 1992) (non-compete agreement).

Rose v. Delaney, 576 So. 2d 232 (Ala. 1991) (indemnity agreement).

Wilson v. Southern Medical Ass’n, 547 So. 2d 510 (Ala. 1989) (employment termination agreement).

International Paper Co. v. Whilden, 469 So. 2d 560, 562 (Ala. 1985). A defendant’s prima facie case of economic duress “consists of (1) wrongful acts or threats, (2) financial distress caused by the wrongful acts or threats; [and] (3) the absence of any reasonable alternative terms presented by the wrongdoer.

Ralls v. First Federal Sav. and Loan Ass’n of Andalusia, 422 So. 2d 764, 766 (Ala. 1982). “The doctrine [economic duress] applies only to special unusual, or extraordinary situations . . . [when] unjustified coercion is used to induce a contract . . .”

Sterling Oil of Oklahoma, Inc. v. Pack, 291 Ala. 727, 287 So. 2d 847 (1973) (doctrine recognized but court deferred fuller treatment until a more appropriate case).

Anderson v. Amberson, 905 So. 2d 811 (Ala. Civ. App. 2004) (release).

Stephens v. Alabama State Docks Terminal Ry., 723 So. 2d 83 (Ala. Civ. App. 1998) (release).

Dorsey v. Bowers, 709 So. 2d 51 (Ala. Civ. App. 1998) (Plaintiff claimed that his insurer used economic duress to prevent him from filing a claim).

Board of School Com'rs of Mobile Cnty. v. Wright, 443 So. 2d 35 (Ala. Civ. App. 1983), reh'g denied (June 1, 1983), rev'd on other grounds, Ex parte Wright, 443 So. 2d 40, 15 Ed. Law Rep. 1017 (Ala. 1983) (new teacher contracts that were one month less in duration and resulted in loss of pay).

Shufford v. Integon Indem. Corp., 73 F. Supp. 2d 1293 (M.D. Ala. 1999) (settlement of insurance claim—accord and satisfaction).

West's Key Number Digest, Contracts ⇨95(1) to 95(4).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 26.07 (5th ed. 2010).

Am. Jur. 2d, Duress and Undue Influence §§ 19 to 23.

Am. Jur. 2d, Contracts § 218 to 220.

C. J. S., Contracts § 239.

6 Lary Lawrence, Lawrence's Anderson on the Uniform Commercial Code § 305:190 to 305:203 (3d ed. 1998).

Alabama Code §§ 7-1-103, 7-1-201(19), 7-1-203 (1975) (West's Alabama Code).

Restatement (Second) of Contracts § 175 (1979).

**APJI 10.29 SUBSTANTIAL PERFORMANCE
[PL]**

Defendant (name of defendant) says that Plaintiff (name of plaintiff) did not perform the things that (he/she/it) was required to do under the contract, and therefore (name of defendant) did not have to perform (his/her/its) obligations under the contract. (Name of plaintiff) must prove both of the following:

1. That (name of plaintiff) made a good faith effort to comply with the contract; and
2. That (name of defendant) received essentially what the contract called for because (name of plaintiff)'s failures, if any, were so trivial or unimportant that they could have been easily fixed or paid for.

If you find that (name of plaintiff) substantially performed the contract, you must award (him/her/it) the contract price less the cost of correcting any trivial defects or omissions.

Notes on Use

Use this instruction when there is evidence that the contract was substantially performed although not literally performed.

References

Mac Pon Co., Inc. v. Vinsant Painting and Decorating Co., 423 So. 2d 216, 35 U.C.C. Rep. Serv. 99 (Ala. 1982). Substantial performance does not mean a full and exact performance in every slight and unimportant detail, but performance of all the important parts.

Bruner v. Hines, 295 Ala. 111, 324 So. 2d 265 (1975). Any question concerning substantial performance is determined according to the particular facts and circumstances of each case.

Miles v. Moore, 262 Ala. 441, 79 So. 2d 432 (1955).

Gray v. Wood, 220 Ala. 587, 127 So. 148 (1930).

APJI 10.29**ALABAMA PATTERN JURY INSTRUCTIONS**

West's Key Number Digest, Contracts ¶293 to 295.

5 Philip L. Bruner & Patrick J. O' Connor, Jr., Bruner and O'Connor on Construction Law § 18:12.

15 Samuel L. Williston & Richard A. Lord, A Treatise on The Law of Contracts §§ 44:52, 44:59 (1990).

Am. Jur. 2d, Contracts § 616.

Christopher Lyle McIlwain, Building Contractor's Recovery for Incomplete Performance, 51 Ala. Law. 230 (July 1990).

ABA Model Jury Instructions, Construction Litigation § 6.06 (2001).

APJI 10.30 to 10.34**Reserved**

**APJI 10.35 DAMAGES—SUBSTANTIAL
PERFORMANCE [PL]**

A party may recover the contract price, less the reasonable costs of remedying any trivial defects or omissions if he has substantially performed such contract.

Notes on Use

Use this instruction to define the measure of damages for substantial performance.

References

Bruner v. Hines, 295 Ala. 111, 324 So. 2d 265 (1975).

Huffman-East Development Corp. v. Summers Elec. Supply Co., 288 Ala. 579, 263 So. 2d 677 (1972).

Alexander v. Smith, 3 Ala. App. 501, 57 So. 104 (1911).

Christopher Lyle McIlwain, Building Contractor's Recovery for Incomplete Performance, 51 Ala. Law. 230 (July 1990).

APJI 10.36 DAMAGES—GENERAL RULE [PL]

If you decide that plaintiff (name of plaintiff) proved (his/her/its) claim against defendant (name of defendant) for breach of contract, you also must decide how much money will reasonably compensate (name of plaintiff) for the harm caused by the breach. This compensation is called “damages.” The purpose of such damages is to put (name of plaintiff) in as good a position as (he/she/it) would have been if (name of defendant) had not broken the contract.

Notes on Use

Use this instruction to define in broad general terms the damages that are recoverable for breach of a contract.

References

Kennedy v. Polar-BEK & Baker Wildwood Partnership, 682 So. 2d 443, 448 (Ala. 1996). Prejudgment interest cannot be awarded on an implied contract claim because the damages for the breach are not certain until determined by the jury.

Coastal States Life Ins. Co. v. Gass, 278 Ala. 656, 180 So. 2d 255 (1965).

Nunnally Co. v. Bromberg & Co., 217 Ala. 180, 115 So. 230 (1928).

Brendle Fire Equipment, Inc. v. Electronic Engineers, Inc., 454 So. 2d 1032 (Ala. Civ. App. 1984).

West’s Key Number, Damages ☞117 to 126, 218.

Jenelle M. Marsh, Alabama Law of Damages §§ 8.3, 8.6, 8.8, 17.1 to 17.13 (6th ed. 2012).

Christopher Lyle McIlwain, Building Contractor’s Recovery for Incomplete Performance, 51 Ala. Law. 230 (July 1990).

Prejudgment interest: Ala. Code § 8-8-1, 8-8-8 (1975) (West’s Alabama Code).

**APJI 10.37 PREJUDGMENT INTEREST ON
DAMAGES FOR BREACH [PL]**

If you are reasonably satisfied that plaintiff (name of plaintiff) is entitled to recover because defendant (name of defendant) broke the contract and you have arrived at the amount of your award, you should then determine the date (name of plaintiff) was entitled to the damages arrived at by you and then add interest at the rate of 6% per annum from that date to today's date.

Revised April 8, 2016

Notes on Use

If prejudgment interest at a certain rate was due upon a breach, and the date of breach, if any, can be determined as a matter of law, the interest computation need not be submitted to the jury. The trial judge can factor that computation into the judgment if plaintiff prevails.

Ala. Code § 8-8-10 (1975) (West's Alabama Code) governs post-judgment interest and the rate is 7.5%.

References

Ala. Code § 8-8-8 (1975) (West's Alabama Code). "All contracts, express or implied, for the payment of money, or other thing, or for the performance of any act or duty, bear interest from the day such money or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed."

Arnold v. Hyundai Motor Manufacturing Alabama, LLC, 292 So. 3d 1042 (Ala. 2019).

Nationwide Mut. Fire Ins. Co. v. Pabon, 903 So. 2d 759, 764 (Ala. 2004).

Lawrence County v. Decatur General Hosp., 675 So. 2d 393 (Ala. 1996). "In contract cases, where an amount is certain or can be made certain as to damages at the time of breach, that amount may be increased by the addition of legal interest from that time until recovery."

APJI 10.37**ALABAMA PATTERN JURY INSTRUCTIONS**

Jefferson County v. City of Birmingham, 235 Ala. 199, 178 So. 226 (1938). Interest proper on amount of claim for damages measured by ascertainable standard.

Broughton v. Mitchell, 64 Ala. 210, 1879 WL 1085 (1879). Interest does not draw interest.

**APJI 10.38 DAMAGES—MENTAL ANGUISH
AND SUFFERING [PL]**

Plaintiff (name of plaintiff) says that (he/she) has had (mental anguish/emotional distress) because (name of defendant) broke the contract. If both parties know or have reason to know that the contract is related to matters of mental concern or with (name of plaintiff)'s feelings, and that the breaking of the contract will reasonably result in (name of plaintiff)'s (mental anguish/emotional distress), then it is proper for those damages to be recovered.

There is no legal rule or yardstick that tells you how much money to award for (mental anguish/emotional distress). The amount you decide to award is up to you, but it must be fair and reasonable, based on sound judgment, and proved by the evidence. In deciding the amount of the award, you may consider, among other things, the nature, severity, and length of the time (name of plaintiff) had (mental anguish/emotional distress).

(You should award (name of plaintiff) an amount for future (mental anguish/emotional distress) if (name of plaintiff) has proved that it is reasonably certain that (he/she) will have (mental anguish/emotional distress) in the future).

Notes on Use

In Alabama the general rule is that mental anguish is not a recoverable element of damages arising from breach of contract. *Bowers v. Wal-Mart Stores, Inc.*, 827 So. 2d 63 (Ala. 2001). Certain exceptions to this general rule have been developed. Where, for example, the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering; it is proper to allow such damages to be recovered in the contract action. Use this instruction in cases where damages for mental anguish have been claimed and proof offered under the above rule to support such claim.

References

Prattville Memorial Chapel v. Parker, 10 So. 3d 546 (Ala. 2008). “An award of damages for mental anguish generally is not allowed in breach-of-contract actions in Alabama. The ground on which the right to recover such damages for mental anguish is denied is that they are too remote, were not within the contemplation of the parties, and that the breach of the contract is not such as will naturally cause mental anguish. Yet where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefore be taken into consideration and awarded.”

Alabama Power Co. v. Harmon, 483 So. 2d 386 (Ala. 1986).

Sanford v. Western Life Ins. Co., 368 So. 2d 260 (Ala. 1979).

B & M Homes, Inc. v. Hogan, 376 So. 2d 667 (Ala. 1979). Damage to a house resulting from faulty construction can lead to recoverability of damages for mental anguish in a breach-of-contract action.

Cooley v. Gulf Bank, Inc., 773 So. 2d 1039 (Ala. Civ. App. 1999) (holding that trial court erred in failing to instruct jury that it could award damages for mental anguish on breach-of-contract claim).

West’s Key Number Digest, Damages ¶56.

Jenelle M. Marsh, Alabama Law of Damages § 17:1 (6th. ed. 2012).

**APJI 10.39 DAMAGES—PARTIAL
PERFORMANCE [PL]**

If an owner broke a construction contract after the contractor partially performed, the contractor's damage is the difference between the price agreed upon in the contract and the cost of performing the contract, in other words, the contractor's loss profits.

Notes on Use

Use this instruction in cases involving building and construction contracts where there has been partial but not substantial performance. Use this instruction with APJI 10.19.

If an excuse for failure to complete performance is claimed by the contractor, additional instructions should be given relative thereto. Ala. Code § 6-5-282 (1975) (West's Alabama Code) provides that where there is a contract for services for a stipulated period of time and performance is prevented by death or sickness, the person or his personal representative may recover ratable compensation for the service actually rendered notwithstanding the entirety of the contract. If completion of the contract has been prevented by the other party, the contractor may recover on the contract, or on quantum meruit. On the contract, the recovery should be the amount of the contract price less the cost of completion of the contract. See APJI 10.20 for Quantum Meruit.

Not to be used in cases under the Uniform Commercial Code.

References

Med Plus Properties v. Colcock Const. Group, Inc., 628 So. 2d 370 (Ala. 1993). In cases where the owner has breached a construction contract after partial performance, the proper measure of damages is the difference between the price agreed upon in the contract and the cost of performance, or, in other words, the contractor's "lost profit."

Charter Corp. v. Lawrence Const. & Development Co., Inc., 289 Ala. 300, 267 So. 2d 147 (1972). To sue for breach of contract, it must be shown that the contractor has complied with the contractual obligations, or an offer of performance must be alleged and shown.

APJI 10.39**ALABAMA PATTERN JURY INSTRUCTIONS**

Hill v. Premier Builders, 56 So. 3d 669, 678 (Ala. Civ. App. 2010).

Christopher Lyle McIlwain, Building Contractor's Recovery for Incomplete Performance, 51 Ala. Law. 230, 231 (1990).

**APJI 10.40 DAMAGES—INTERFERENCE WITH
CONTRACT OR BUSINESS
RELATIONSHIP [PL]**

The amount of money you award (name of plaintiff) may include:

1. The profit lost on the (contract/business relationship);
2. Consequential losses caused by the interference;
3. Emotional distress or actual harm to (name of plaintiff)'s reputation that resulted from the interference; and
4. Punitive damages.

Notes on Use

Use this instruction when a claim is made for interference with a contract or business relationship. The trial judge must determine whether to instruct on a particular type of damage.

See APJI 11.03 on Punitive Damages and APJI 11.40 on Loss of Profits. APJI 10.38 on Mental Anguish can be modified to fit an interference case.

References

Roberson v. C.P. Allen Const. Co., Inc., 50 So. 3d 471, 30 I.E.R. Cas. (BNA) 1242 (Ala. Civ. App. 2010).

White Sands Group, L.L.C. v. PRS II, LLC, 32 So. 3d 5 (Ala. 2009).

Rogers v. Nall, 583 So. 2d 271 (Ala. 1991). Punitive damages may be awarded if the act of interference was carried out wantonly, spitefully, or maliciously.

Engineered Cooling Services, Inc. v. Star Service, Inc. of Mobile, 108 So. 3d 1022 (Ala. Civ. App. 2012).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 26.05 (5th ed. 2010).

APJI 10.40

ALABAMA PATTERN JURY INSTRUCTIONS

APJI 10.41 to 10.46

Reserved

**APJI 10.47 GOOD FAITH AND FAIR DEALING
[PL]**

Good faith and fair dealing are required of all parties to a contract. This means the parties must cooperate with each other so that each may obtain the full benefit of the contract.

Notes on Use

Use this instruction when the promisor's duty to perform is conditioned upon occurrence of some event wholly within his control.

References

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So. 2d 143 (1975).

West's Key Number Digest, Contracts ⇨168.

APJI 10.48 TIME FOR PERFORMANCE [PL]

If a contract does not state a specific time for the parties to do what they promised, then they must do it within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons why each party entered into the contract and the intentions of the parties at the time they entered the contract (and other examples as applicable). Whether an act was performed in a reasonable time is for you to decide.

Notes on Use

Use this instruction when no specific time for performance is stated in a contract and any party to the contract contends that performance was or was not timely.

References

Lemon v. Golf Terrace Owners Ass'n, 611 So. 2d 263 (Ala. 1992).

Seybold v. Magnolia Land Co., 376 So. 2d 1083 (Ala. 1979). When a contract provides no fixed time for performance, the claimant must generally make a demand for performance in order to put the other party in default, and if a demand for performance is required, it should be made within a reasonable time after it lawfully can be made.

Hendrix, Mohr & Yardley, Inc. v. City of Daphne, 359 So. 2d 792 (Ala. 1978).

Smith v. Pope, 280 Ala. 662, 197 So. 2d 767 (1967).

Sims v. City of Birmingham, 256 Ala. 540, 55 So. 2d 833 (1951).

West's Key Number Digest, Contracts ¶212, 353.

Am. Jur. 2d, Contracts §§ 466 to 468.

APJI 10.49 INTERPRETATION [PL]

Plaintiff (Name of plaintiff) and defendant (name of defendant) dispute the meaning of (state the dispute). (Name of plaintiff) says (state plaintiff's contention). (Name of defendant) says (state defendant's contention). (Name of plaintiff) must prove to your reasonable satisfaction that (his/her/its) interpretation of the contract is correct. You must decide what the parties intended at the time the contract was created. In deciding intent, you may consider the usual and ordinary meaning of the language used in the contract, the relationship of the parties, what they said and what they did, and all the circumstances surrounding the making of the contract. Words in a contract have their usual and ordinary meaning unless you decide that the parties intended the words to mean something else. In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just parts of it. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

Notes on Use

Use this instruction in cases that require a determination of the intention of parties to contract. The interpretation of a contract should not be presented to the jury unless the court determines that the contractual language is ambiguous.

References

Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 2000-1 Trade Cas. (CCH) ¶ 72784 (Ala. 2000).

Pacific Ins. Co. v. Wilbanks, 283 Ala. 1, 214 So. 2d 279 (1968).

Vardaman v. Benefit Ass'n of Ry. Employees, 263 Ala. 236, 82 So. 2d 272 (1955).

West's Key Number Digest, Contracts ¶147.

Am. Jur. 2d, Contracts §§ 345 to 411.

APJI 10.50 NOVATION [PL]

Defendant (name of defendant) claims that the original contract with Plaintiff (name of plaintiff) cannot be enforced because the parties substituted a new and different contract for the original.

To prove this defense, (name of defendant) must prove to your reasonable satisfaction that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that (name of defendant) has proved this, then the original contract is not enforceable.

Notes on Use

Use this instruction when any party relies on a novation.

References

Smith v. Mid South Fiberglass, Inc., 531 So. 2d 649 (Ala. 1988). A novation is the substitution of one contract for another; and it releases the party bound by the original contract.

Braswell Wood Co., Inc. v. Fussell, 474 So. 2d 67 (Ala. 1985). A novation extinguishes the preexisting obligation.

Haygood v. Woods, 507 So. 2d 525 (Ala. Civ. App. 1987). The party alleging a novation has the burden of proving that the parties intended a novation.

West's Key Number Digest, Novation ⇨1, 13.

30 Samuel L. Williston & Richard A. Lord, A Treatise on The Law of Contracts § 76:20 (4th ed. 1990).

Am. Jur. 2d, Contracts §§ 500 to 505.

Am. Jur. 2d, Novation § 3.

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APJI 10.50

APJI 10.51 to 10.55

Reserved

**APJI 10.56 NON-PERFORMANCE—EXCUSES
[PL]**

The committee recommends that no pattern instruction be formulated on this subject because the various justifiable reasons for nonperformance are so wide and diverse that it would be impractical to draft a pattern instruction. Justification can, in some cases, include acts of God, fraud, mutual mistake, war, destruction of subject matter, death of essential party, weather, illegality, and numerous other reasons.

References

West's Key Number Digest, Contracts ☞303(1) to 303(5).

Am. Jur. 2d, Contracts §§ 644 to 683.

A.L.R. Library

Change in character of neighborhood as affecting validity or enforceability of restrictive covenant, 76 A.L.R.5th 337 (2000).

Chapter 11

Damages [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 11.00 Introduction [PL]
- APJI 11.01 Compensatory Damages [PL]
- APJI 11.02 Nominal Damages [PL]
- APJI 11.03 Punitive Damages [PL]
- APJI 11.04 Punitive Damages—Harm to Nonparties [PL]
- APJI 11.05 to 11.08 Reserved
- APJI 11.09 Personal Injury Damages—Types [PL]
- APJI 11.10 Personal Injury—Physical Pain and Mental Anguish [PL]
- APJI 11.11 Mental Anguish—Zone of Danger [PL]
- APJI 11.12 Permanent Injury or Disfigurement [PL]
- APJI 11.13 Personal Injury—Aggravation of Pre-Existing Condition [PL]
- APJI 11.14 Subsequent Injury or Disease Caused by Original Injury [PL]
- APJI 11.15 Personal Injury—Medical Expenses [PL]
- APJI 11.16 Loss of Income (From Time of Injury to Time of Trial) [PL]
- APJI 11.17 Loss of Future Earnings [PL]
- APJI 11.18 Loss of Future Earning Capacity [PL]
- APJI 11.19 to 11.21 Reserved
- APJI 11.22 Damages Other Than Personal Injury [PL]
- APJI 11.23 Consortium [PL]
- APJI 11.24 Medical Expenses for Spouse or Child [PL]
- APJI 11.25 Parent's Nursing Services for Child—Value [PL]
- APJI 11.26 Loss of Services—Minor Child Temporary Disability [PL]
- APJI 11.27 Loss of Services—Minor Child Permanent Disability [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

- APJI 11.28 Wrongful Death [PL]
 APJI 11.29 Mortality Tables [PL]
 APJI 11.30 to 11.33 Reserved
 APJI 11.34 Personal Property [PL]
 APJI 11.35 Personal Property—Cost To Repair [PL]
 APJI 11.36 Damages—Personal Vehicle [PL]
 APJI 11.37 General Rule Commercial Vehicle-Repairs and Loss of Use [PL]
 APJI 11.38 Vehicle—Total Loss [PL]
 APJI 11.39 Real Property General Rule—Direct Compensatory Damages [PL]
 APJI 11.40 Loss of Profits—New or Unestablished Business [PL]
 APJI 11.41 Mitigation—Definition and Burden Of Proof [PL]
 APJI 11.42 Punitive Damages—Principal's Vicarious Liability [PL]
 APJI 11.43 Release—Definition, Effect, and Burden of Proof [PL]
 APJI 11.44 Pro Tanto Release—Effect [PL]
 APJI 11.45 Specific Release [PL]
 APJI 11.46 Payment—Receipt—Burden of Proof [PL]
 APJI 11.47 Release—Avoidance—Fraud [PL]
 APJI 11.48 Release—Avoidance—Duress [PL]
 APJI 11.49 Release—Avoidance—Failure of Consideration [PL]
 APJI 11.50 Combined Damages—Personal Injury and Wrongful Death [PL]

Chapter 11 Conversion Chart

Title of Instruction	Third Edition Instruction Number	Second Edition Instruction Number
Introduction	11.00	11.01
Compensatory Damages	11.01	11.02
Nominal Damages	11.02	New
Punitive Damages	11.03	11.03
Punitive Damages—Harm To Nonparties	11.04	New
RESERVED	11.05–11.08	
Personal Injury Damages—Types	11.09	11.04
Personal Injury—Physical Pain and Mental Anguish	11.10	11.05
Mental Anguish—Zone of Danger	11.11	New

DAMAGES

Title of Instruction	Third Edition Instruction Number	Second Edition Instruction Number
Permanent Injuries or Disfigurement	11.12	11.06
Personal Injury—Aggravation of Pre-existing Condition	11.13	11.07
Subsequent Injury or Disease Caused by Original Injury	11.14	11.08
Personal Injury—Medical Expenses	11.15	11.09
Loss of Earnings	11.16	11.10
Loss of Future Earnings or Future Earning Capacity	11.17	11.11
RESERVED	11.18–11.21	
Damages Other Than Personal Injury	11.22	11.12
Consortium	11.23	11.13, 11.13-A
Medical Expenses for Spouse and Child	11.24	11.14
Parent's Nursing Services for Child—Value	11.25	11.15
Loss of Services—Minor Child—Temporary Disability	11.26	11.16
Loss of Services—Minor Child—Permanent Disability	11.27	11.17
Wrongful Death	11.28	New
Mortality Tables	11.29	11.19
RESERVED	11.30–11.33	
Personal Property	11.34	11.23
Personal Property—Cost to Repair	11.35	11.24
Damages—Personal Vehicle	11.36	New
General Rule—Commercial Vehicle—Repairs and Loss of Use	11.37	11.25
Vehicle—Total Loss	11.38	New
Real Property—General Rule—Direct Compensatory Damages	11.39	11.26
Loss of Profits—New or Unestablished Business	11.40	11.38
Mitigation—Definition and Burden of Proof	11.41	11.39
Punitive Damages—Principal's Vicarious Liability	11.42	11.37
Release—Definition, Effect and Burden of Proof	11.43	11.31, 11.32, 11.33
Pro Tanto Release—Effect	11.44	11.30
Specific Release	11.45	11.39
Payment—Receipt—Burden of Proof	11.46	New

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Third Edition Instruction Number	Second Edition Instruction Number
Release—Avoidance—Fraud	11.47	11.34
Release—Avoidance—Duress	11.48	New
Release—Avoidance—Failure of Con- sideration	11.49	11.35, 11.36
Combined Damages—Personal Injury and Wrongful Death	11.50	New

APJI 11.00 INTRODUCTION [PL]

(Name of plaintiff)'s claims are for (describe the claims, e.g., negligence, wantonness, breach of contract, etc.).

If (name of plaintiff) has not proved (the/a) claim, your verdict must be for (name of defendant) on that claim and you do not consider damages.

If (name of plaintiff) has proved (the/a) claim, you must then decide how much money to award (name of plaintiff) on that claim. The money you award is called damages.

(Name of plaintiff) asks you to award compensatory damages for the harm caused by (name of defendant) (and (he/she/it) also asks you to award punitive damages).

(Name of plaintiff) must prove the amount of compensatory damages to your reasonable satisfaction from the evidence and the reasonable inferences from the evidence. You cannot guess at the amount of damages. (I will explain punitive damages later in this instruction.)

I will give you a written verdict form, and you will use that form to report your decision in the case. At the end of these instructions I will tell you how to use the form.

Notes on Use

Use this instruction to introduce the subject of damages to the jury and to instruct the jury on the standard of proof to recover compensatory damages.

The first two paragraphs in this instruction can be used in a wrongful death case. The wrongful death instruction is APJI 11.28.

APJI 11.01 COMPENSATORY DAMAGES [PL]

Compensatory damages are awarded to fairly and reasonably compensate for the harm caused by another's wrongful conduct.

Notes on Use

Use this instruction after giving APJI 11.00.

References

Edwards v. Allied Home Mortg. Capital Corp., 962 So. 2d 194, 61 U.C.C. Rep. Serv. 2d 710 (Ala. 2007).

Life Ins. Co. of Georgia v. Smith, 719 So. 2d 797 (Ala. 1998).

Torsch v. McLeod, 665 So. 2d 934 (Ala. 1995).

Sessions Co., Inc. v. Turner, 493 So. 2d 1387 (Ala. 1986).

Youngblood v. Bailey, 459 So. 2d 855, 39 U.C.C. Rep. Serv. 875 (Ala. 1984).

Matheny v. Petersen, 276 Ala. 478, 163 So. 2d 635 (1964).

Hardy Ins. Co. v. Baumhauer-Croom Ins., 339 So. 2d 584 (Ala. Civ. App. 1976).

Jenelle M. Marsh, Alabama Law of Damages § 36:2 (6th ed. 2012).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.01 (5th ed. 2010).

Am. Jur. 2d, Damages §§ 24 to 36.

APJI 11.02 NOMINAL DAMAGES [PL]

Nominal damages are a small amount of money awarded, for example \$1, when you are reasonably satisfied from the evidence that (name of plaintiff) has been harmed, but (he/she/it) has not proved the amount that you should award.

Notes on Use

Do not give this instruction when compensatory damages are an element of the plaintiff's cause of action. No effort is made to specify the causes of action that compensatory damages are an element of plaintiff's proof. Nominal damages can be recovered in instances when (1) the defendant has violated the plaintiff's rights, but plaintiff has not proved any harm; (2) the plaintiff has sued only to establish a right and has not claimed compensatory damages; and (3) plaintiff has put on evidence of proof of harm but it is not sufficient for the jury to determine an amount of an award of compensatory damages.

In the appropriate case, use this instruction to define nominal damages unless a claim-specific instruction in Alabama Pattern Jury Instruction—Civil, includes a nominal damages provision. For example, see APJI 23.16 (nominal damages recoverable on a claim for libel or slander per se) or APJI 31.76 (nominal damages recoverable in trespass).

References

Roberson v. C.P. Allen Const. Co., Inc., 50 So. 3d 471, 477 (Ala. 2010). Nominal damages are “awarded . . . in recognition of the invasion of the legal rights of the plaintiff.” They are awarded when the plaintiff “suffered no actual damage or failed to prove any actual damage.”

Williams v. Citizens Bank of Guntersville, 350 So. 2d 1031 (Ala. 1977). “Nominal damages are ‘a small sum fixed, without regard to the extent of the harm done, by the custom of the jurisdiction in which the action is brought.’ Corbin on Contracts, Vol. 5 § 1001, pp. 29 - 30.”

Jackson v. Roddy, 224 Ala. 132, 139 So. 354 (1932). The jury awarded one cent in a personal injury action. However, the court did not describe it as nominal damages.

Benson v. Vick, 460 So. 2d 1309, 1312 (Ala. Civ. App. 1984). “[A]n award of one dollar is, in effect, an award of nominal damages.”

McDonald v. Amason, 39 Ala. App. 492, 104 So. 2d 716 (1958), cert stricken, 267 Ala. 654, 104 So. 2d 719 (1958). “If a cause of action [is] proved, the plaintiff is entitled at a minimum to nominal damages.”

West’s Key Number Digest, Damages ⇐4, 8 to 14.

Am. Jur. 2d, Damages §§ 8 to 23.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 42.01 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 3:1 to 3:3, 36:2 n.5, 1 (6th ed. 2012).

Charles T. McCormick, Damages §§ 21 to 24 (West Hornbook Series 1935).

Restatement (Second) of Torts § 907 cmt. a (1979).

Black’s Law Dictionary 447 (9th ed. 2009).

APJI 11.03 PUNITIVE DAMAGES [PL]

Punitive damages are awarded to a plaintiff to punish a defendant for (his/her/its) wrongful conduct, and to protect the public by deterring or discouraging the defendant and others from doing the same or similar wrongs in the future.

Before you can award punitive damages (1) you must have decided to award (name of plaintiff) compensatory or nominal damages; and (2) (name of plaintiff) must have proved by clear and convincing evidence that (name of defendant) consciously or deliberately acted toward (name of plaintiff) with (oppression) (fraud) (wantonness) or (malice).

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim and a high probability that your conclusion is correct.

Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt.

(Oppression means causing a person to undergo cruel and unjust hardship in knowing disregard of that person's rights.)

(Fraud means an intentional misrepresentation, deceit, or concealment of an important fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed by the defendant with the intention of depriving a person or entity of property or legal rights or otherwise causing injury.)

(Wantonness is conduct that is carried on with a reckless or conscious disregard of the rights or safety of others.)

(Malice is the intentional doing of a wrongful act without just cause or excuse, either:

1. With an intent to injure the person or property of another person or entity, or
2. Under circumstances that the law will imply an evil intent.

Whether you award punitive damages is up to you. If you do, the amount of the award is determined by the character and degree of (name of defendant)'s wrongful conduct, and the necessity to prevent the same or similar wrongful conduct by the defendant and others in the future.

Notes on Use

Do not use this instruction in a wrongful death case; use APJI 11.28.

Ala. Code § 6-11-20 (1975) (West's Alabama Code) applies in all civil tort actions, except actions brought under § 6-5-391 and § 6-5-410, when the plaintiff seeks an award of punitive damages. Therefore, the trial judge must instruct the jury on the applicable criteria stated in § 6-11-20(b) because the plaintiff must satisfy one of them before the jury may award punitive damages.

The statement "under circumstances that the law will imply an evil intent", § 6-11-20(b)(2)(a), is a legislative recognition there are other circumstances that will satisfy the malice requirement. The user must determine those circumstances as a matter of law and draft an appropriate instruction based on the facts of the case.

Because "reasonable doubt" is not defined in Ala. Code § 6-11-20 (1975) (West's Alabama Code), it may be appropriate to instruct the jury on reasonable doubt to draw the distinction between the terms. One instruction on reasonable doubt is, as follows:

A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in this case. It is a doubt based on reason and common sense. A reasonable doubt is not a notion that is confused or contrary to reason. It is an actual doubt based on the evidence, or lack of evidence, or a combination of them. It is a doubt that remains after going over in your mind the entire case and considering all the evidence. A reasonable doubt is different from a doubt based on a mere possibility, or

a doubt based on bare imagination, or a doubt based on guesswork.

If the plaintiff introduces pattern and practice evidence or evidence that the defendant's conduct harmed others who are not parties to the lawsuit, give Punitive Damages—Harm to Nonparties instruction in APJI 11.04.

References

Ala. Code § 6-11-20 (1975) (West's Alabama Code).

Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570, 66 Env't. Rep. Cas. (BNA) 1545, 2008 A.M.C. 1521 (2008).

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, Prod. Liab. Rep. (CCH) P 16805, 60 Fed. R. Evid. Serv. 1349 (2003).

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

S.B. v. Saint James School, 959 So. 2d 72, 222 Ed. Law Rep. 444 (Ala. 2006).

Prudential Ballard Realty Co., Inc. v. Weatherly, 792 So. 2d 1045 (Ala. 2000).

Gray Brown-Service Mortuary, Inc. v. Lloyd, 729 So. 2d 280 (Ala. 1999).

State Farm Fire and Cas. Co. v. Owen, 729 So. 2d 834 (Ala. 1998).

Life Ins. Co. of Georgia v. Smith, 719 So. 2d 797 (Ala. 1998).

American Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997).

Ex parte Gradford, 699 So. 2d 149 (Ala. 1997).

Engineered Cooling Servs., Inc. v. Starr Serv., Inc. of Mobile, 108 So. 3d 1022 (Ala. Civ. App. 2012).

Hurst v. Cook, 981 So. 2d 1143 (Ala. Civ. App. 2007).

West's Key Number Digest, Damages ☞87 to 94.10.

APJI 11.03**ALABAMA PATTERN JURY INSTRUCTIONS**

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 42.01 to 42.12 (5th ed. 2010).

Jenelle M. Marsh, *Alabama Law of Damages* §§ 4:1 to 4:11, 36:2 (6th ed. 2012).

Am. Jur. 2d, *Damages* §§ 539 to 567.

William E. Shreve, Jr., *Exploring Wantonness*, 74 Ala. Law. 48 (Jan. 2013).

Christopher L. Yeilding & Conrad Anderson, IV, *Alabama Supreme Court Clarifies Statute of Limitations for Wantonness*, 72 Ala. Law. 480 (Nov. 2011).

**APJI 11.04 PUNITIVE DAMAGES—HARM TO
NONPARTIES [PL]**

(Name of plaintiff) has presented evidence that (name of defendant)'s conduct caused harm to other people. If you find that (name of defendant)'s conduct caused harm to others, you may consider this evidence to determine the degree of reprehensibility of (name of defendant)'s misconduct in this case. However, you cannot award (name of plaintiff) compensatory or punitive damages for the harm (name of defendant)'s misconduct caused other people. You can punish (name of defendant) only for (his/her/its) misconduct toward (name of plaintiff).

Notes on Use

Use this instruction to determine the degree of defendant's reprehensibility when the plaintiff introduces evidence of the defendant's similar acts that harmed other people, whether the misconduct occurred in or outside of Alabama.

References

Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940, Prod. Liab. Rep. (CCH) P 17676 (2007).

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, Prod. Liab. Rep. (CCH) P 16805, 60 Fed. R. Evid. Serv. 1349 (2003).

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), judgment rev'd on other grounds, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 42.12, 44.05[2] (5th ed. 2010).

Jennelle M. Marsh, Alabama Law of Damages §§ 4:3, 4:10, 4:11 (6th ed. 2012).

I Charles W. Gamble and Robert J. Goodwin, McElroy's Alabama Evidence § 70.03(6) (6th ed. 2009).

APJI 11.04**ALABAMA PATTERN JURY INSTRUCTIONS**

Am. Jur. 2d, Damages §§ 827 to 833.

Ala. R. Evid. 404(b).

Matthew Keller, “Let No Similar Facts be Admitted. . .”—
Unless You Want Punitive Damages, 4 Charleston L. Rev. 855
(Summer 2010).

Benjamin J. Robinson, Distilling Minimum Due Process
Requirements for Punitive Damages, 60 Fla. L. Rev. 991 (2008).

APJI 11.05 to 11.08

Reserved

**APJI 11.09 PERSONAL INJURY DAMAGES—
TYPES [PL]**

(Name of plaintiff) asks for damages for the following:

(Physical pain and mental anguish)

(Mental anguish—zone of danger)

(Permanent injuries or disfigurement)

(Aggravation of pre-existing condition)

(Injury aggravated by disease or other cause)

(Medical expenses)

(Loss of income from the date of injury to trial)

(Loss of future earnings)

(Loss of future earning capacity)

(Others as claimed)

Revised August 9, 2019

Notes on Use

Use this instruction to summarize the types of damages the plaintiff claims. The types of damages are listed in the same order as they follow in this chapter.

References

Mobile Light & R. Co. v. Gadik, 211 Ala. 582, 100 So. 837 (1924).

South & N.A.R. Co. v. McLendon, 63 Ala. 266, 1879 WL 999 (1879).

Gardner v. Sumner, 40 Ala. App. 340, 113 So. 2d 523 (1959).

West's Key Number Digest, Damages ⚡30.

APJI 11.09**ALABAMA PATTERN JURY INSTRUCTIONS**

Jenelle M. Marsh, Alabama Law of Damages § 1:11 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 20, 119 to 128.

APJI 11.10 PERSONAL INJURY—PHYSICAL PAIN AND MENTAL ANGUISH [PL]

(Name of plaintiff) says that (he/she) has had (pain and suffering) (mental anguish) (emotional distress) (and will have future pain and suffering/mental anguish/emotional distress).

There is no legal rule or yardstick that tells you how much money to award for physical pain (and mental anguish). The amount you decide to award is up to you, but it must be fair and reasonable, based on sound judgment, and proved by the evidence. In deciding the amount of the award, you may consider, among other things, the nature, severity, and length of time (name of plaintiff) had physical pain (and mental anguish).

(You should award (name of plaintiff) an amount for future physical pain (and mental anguish) if (name of plaintiff) has proved that it is reasonably certain that (he/she) will have physical pain (and mental anguish) in the future.)

Notes on Use

It is a rare case when a plaintiff does not request compensation for physical pain and mental anguish or does not ask for an award of future physical pain and mental anguish. But, in that rare case, the parenthetical language may be omitted. The instruction does not use the words “emotional distress”; however, the words “mental anguish” and “emotional distress” now seem to be interchangeable.

The instruction does not distinguish between damages for mental anguish awarded as the result of a physical injury and the damages awarded because the plaintiff was in the zone of danger. First use APJI 11.11 to instruct on damages when the plaintiff did not have a physical injury but claims being in the zone of danger caused mental anguish.

References

Akins Funeral Home, Inc. v. Miller, 878 So. 2d 267 (Ala. 2003).

Orkin Exterminating Co., Inc. v. Jeter, 832 So. 2d 25 (Ala. 2001).

Daniels v. East Alabama Paving, Inc., 740 So. 2d 1033 (Ala. 1999) (physical injury and mental anguish).

Kmart Corp. v. Kyles, 723 So. 2d 572 (Ala. 1998) (no physical injury but plaintiff claimed mental anguish).

Volkswagen of America, Inc. v. Dillard, 579 So. 2d 1301, Prod. Liab. Rep. (CCH) P 12818, 14 U.C.C. Rep. Serv. 2d 475 (Ala. 1991). This case involved the sale of a new car and a claim for breach of express warranty. It is included in the references only to call attention to the definitions of “personal injury” and “mental anguish”.

Alabama Power Co. v. Mosley, 294 Ala. 394, 318 So. 2d 260 (1975).

W. S. Fowler Rental Equipment Co. v. Skipper, 276 Ala. 593, 165 So. 2d 375 (1963), common law duties to a licensee superseded by Recreational Use Statutes under the circumstances stated in those statutes, Ex parte Town of Dauphin Island, 274 So. 3d 237 (Ala. 2018).

Vinson v. Southern Bell Telephone & Telegraph Co., 188 Ala. 292, 66 So. 100 (1914).

West’s Key Number Digest, Damages ☞31, 32, 57.1 to.18, 57.24 to.35, 96, 97, 102.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Laws §§ 40.04 and 40.06 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 36:3, 36:6 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 200 to 221, 327.

Hudgens, Note, Torts—Use of Mathematical Formula to Compute Damages for Pain and Suffering, 11 Ala. L. Rev. 207 (1958).

APJI 11.11 MENTAL ANGUISH—ZONE OF DANGER [PL]

(Name of plaintiff) says that (he/she) has had mental anguish (and will have mental anguish in the future).

To recover for mental anguish, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of defendant)'s conduct was negligent or wanton;

2. That it was reasonably foreseeable that (name of defendant)'s conduct would place (name of plaintiff) in immediate risk of physical harm;

3. That (name of defendant)'s conduct placed (name of plaintiff) in immediate risk of physical harm; and

4. That the immediate risk of physical harm caused (name of plaintiff) mental anguish.

(If (name of plaintiff) has proved that (he/she) will have mental anguish in the future, you should award (him/her) for the future mental anguish.)

Notes on Use

Use this instruction when the plaintiff did not have a physical injury but claims damages for mental anguish because he or she was placed in the zone of danger.

References

Ex parte Grand Manor, Inc., 778 So. 2d 173 (Ala. 2000).

Wal-Mart Stores, Inc. v. Bowers, 752 So. 2d 1201 (Ala. 1999).

Daniels v. East Alabama Paving, Inc., 740 So. 2d 1033 (Ala. 1999).

White Consol. Industries, Inc. v. Wilkerson, 737 So. 2d 447, Prod. Liab. Rep. (CCH) P 15501 (Ala. 1999).

APJI 11.11**ALABAMA PATTERN JURY INSTRUCTIONS**

Kmart Corp. v. Kyles, 723 So. 2d 572 (Ala. 1998).

AALAR, Ltd., Inc. v. Francis, 716 So. 2d 1141 (Ala. 1998).

City of Mobile v. Taylor, 938 So. 2d 407 (Ala. Civ. App. 2005).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.06 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 36:6 (6th ed. 2012).

**APJI 11.12 PERMANENT INJURY OR
DISFIGUREMENT [PL]**

(Name of plaintiff) says (he/she) is (permanently harmed) (permanently disfigured).

The purpose of awarding damages for permanent (harm) (disfigurement) is to compensate (name of plaintiff) for the (harm) (disfigurement).

Harm is permanent if, in all reasonable probability, it will continue for the rest of (name of plaintiff)'s life.

You must decide whether (name of plaintiff) is (permanently harmed) (permanently disfigured), and if so what amount of damages will reasonably compensate (him/her) for the (harm) (disfigurement).

Notes on Use

Use this instruction when the plaintiff claims a permanent injury.

References

Jones v. Fortner, 507 So. 2d 908 (Ala. 1987).

Carnival Cruise Lines, Inc. v. Snoddy, 457 So. 2d 379 (Ala. 1984).

Beloit Corp. v. Harrell, 339 So. 2d 992 (Ala. 1976).

Alabama Great Southern R. Co. v. Flinn, 199 Ala. 177, 74 So. 246 (1917).

Seaboard Mfg. Co. v. Woodson, 98 Ala. 378, 11 So. 733 (1892).

Alabama G.S.R. Co. v. Hill, 93 Ala. 514, 9 So. 722 (1891).

Phillips v. Tays, 555 So. 2d 1096 (Ala. Civ. App. 1989).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.09 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 36:9 (6th ed.

2012).

**APJI 11.13 PERSONAL INJURY—
AGGRAVATION OF PRE-EXISTING
CONDITION [PL]**

If you decide that (name of plaintiff) had a preexisting condition, whether (he/she) knew it or not, and that (name of defendant)'s conduct aggravated the condition, then you will award (name of plaintiff) an amount that reasonably compensates (him/her) for the harm caused by (name of defendant)'s conduct.

The fact that (name of plaintiff) had a pre-existing condition that made it more likely that (he/she) would be harmed by (name of defendant)'s conduct does not affect the amount of damages that (he/she) is entitled to recover for that harm.

Notes on Use

Use this instruction when the plaintiff claims aggravation of a pre-existing condition.

References

National Ins. Ass'n v. Sockwell, 829 So. 2d 111 (Ala. 2002).

J.B. Hunt Transport, Inc. v. Credeur, 681 So. 2d 1355 (Ala. 1996).

Wickham v. Cotten, 465 So. 2d 388 (Ala. 1985).

Cooper v. Magic City Trucking Service, Inc., 288 Ala. 585, 264 So. 2d 146 (1972).

Newton v. Altman, 227 Ala. 465, 150 So. 698 (1933).

Louisville & N.R. Co. v. Wright, 202 Ala. 255, 80 So. 93 (1918).

Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209, 9 So. 363 (1891).

Waters v. Alabama Farmers Co-op., Inc., 681 So. 2d 622 (Ala. Civ. App. 1996) (workers compensation).

West's Key Number Digest, Damages ☞158(5).

APJI 11.13**ALABAMA PATTERN JURY INSTRUCTIONS**

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.10 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 36:2, 36:10 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 238 to 241.

**APJI 11.14 SUBSEQUENT INJURY OR
DISEASE CAUSED BY ORIGINAL
INJURY [PL]**

(Name of plaintiff) says that after (name of defendant)'s conduct caused (him/her) harm, (he/she) (describe the event that caused plaintiff's new injury, e.g., fell because of weakened condition and broke hip, stepped in a hole and hurt lower back, treating physician was negligent, etc.), and (name of defendant)'s conduct caused the new harm.

If you decide that (name of plaintiff)'s later harm was caused by (name of defendant)'s conduct, you can award (name of plaintiff) an amount that reasonably compensates (him/her) for all of the harm.

Notes on Use

Use this instruction when the plaintiff claims that a later injury was caused by the defendant's original negligent, etc., conduct. The examples in the instruction are from the referenced cases; however, the committee points out that in *Alabama Farm Bureau v. Henderson*, 374 So. 2d 355 (Ala. Civ. App. 1979), Henderson did not prove that defendant's negligence caused the plaintiff to step in a hole and injure his lumbar spine.

References

Looney v. Davis, 721 So. 2d 152 (Ala. 1998).

Malcolm v. King, 686 So. 2d 231 (Ala. 1996).

Williams v. Woodman, 424 So. 2d 611 (Ala. 1982).

Underwood v. Smith, 261 Ala. 181, 73 So. 2d 717 (1954).

Alabama Farm Bureau v. Henderson, 374 So. 2d 355 (Ala. Civ. App. 1979).

West's Key Number Digest, Damages ¶34, 57.60.

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 40.11 (5th ed. 2010).

APJI 11.14**ALABAMA PATTERN JURY INSTRUCTIONS**

Jenelle M. Marsh, Alabama Law of Damages §§ 36:2, 36:11
(6th ed. 2012).

Am. Jur. 2d, Damages §§ 122 to 124, 242 to 247.

**APJI 11.15 PERSONAL INJURY—MEDICAL
EXPENSES [PL]**

(Name of plaintiff) says that (name of defendant)'s conduct caused (him/her) expenses for medical care, treatment, and services.

The measure of damages for medical expenses is all reasonable expenses for medical care, treatment, and services caused by (name of defendant)'s conduct, (and the amount of reasonable expenses for medical care, treatment and services that (name of plaintiff) is reasonably certain to need in the future.)

You must decide if the treatment was reasonably necessary, that the expenses for it were reasonable in amount, and that the need for the treatment was caused by (name of defendant)'s conduct.

(When there is evidence of third party payment of medical expenses, give the following as appropriate.)

There is evidence that a third party (satisfied) (paid) (name of plaintiff)'s medical expenses, and (name of defendant) asks that you reduce the amount of any award for medical expenses.

(When there is evidence of cost of obtaining reimbursement, give the following as appropriate.)

There is also evidence of the cost of obtaining reimbursement or payment of medical expenses.

(When there is evidence of subrogation, give the following as appropriate.)

There is also evidence that (name of plaintiff) will have to pay back from any award the money (name of third party provider) paid for (name of plaintiff)'s medical expenses.

(When any of the above additional paragraphs are given, give the following also.)

You may consider all this evidence in determining the amount of your award.

Approved Sept. 9, 2009

Revised Feb. 10, 2012

Revised May 6, 2016

Notes on Use

Use this instruction when plaintiff claims damages for medical expenses for his or her personal injury, and when defendant puts on evidence that all or some of plaintiff's medical expenses were paid by a third party provider. Use APJI 11.24 to instruct on medical expenses for a wife or child.

The references are to cases that state the law about the measure of damages for medical expenses and cases that discuss the collateral source rule and its abrogation by Ala. Code § 12-21-45 (1975) (West's Alabama Code). *Senn v. Alabama Gas Corp.*, 619 So. 2d 1320 (Ala. 1993); *Melvin v. Loats*, 23 So. 3d 666 (Ala. Civ. App. 2009); *Crocker v. Grammer*, 87 So. 3d 1190 (Ala. Civ. App. 2011), cert. denied, No. 1101517 (Ala. Jan. 13, 2012) holds that the Alabama Rules of Evidence did not repeal Ala. Code § 12-21-45.

References

Arthur v. Bolen, 41 So. 3d 745 (Ala. 2010).

Ex parte Courtney, 937 So. 2d 1060 (Ala. 2006).

Dairyland Ins. Co. v. Jackson, 566 So. 2d 723 (Ala. 1990).

Hollis v. Scott, 516 So. 2d 576 (Ala. 1987).

Elba Wood Products, Inc. v. Brackin, 356 So. 2d 119 (Ala. 1978).

Stone v. Echols, 351 So. 2d 902 (Ala. 1977).

Crocker v. Grammer, 87 So. 3d 1190 (Ala. Civ. App. 2011), cert. denied, No. 1101517 (Ala. Jan. 13, 2012).

Daniels v. Kapoor, 64 So. 3d 62 (Ala. Civ. App. 2010).

Melvin v. Loats, 23 So. 3d 666 (Ala. Civ. App. 2009).

Bergob v. Scrushy, 855 So. 2d 523 (Ala. Civ. App. 2002).

Wells v. Mohammad, 879 So. 2d 1188 (Ala. Civ. App. 2003).

Savoy v. Watson, 852 So. 2d 137 (Ala. Civ. App. 2002).

Brannon v. Webster, 562 So. 2d 1337 (Ala. Civ. App. 1990).

West's Key Number Digest, Damages ⇨43.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.03 (4th ed. 2004).

Jenelle M. Marsh & Charles W. Gamble, Alabama Law of Damages § 36:3 (5th ed. 2004).

Am. Jur. 2d, Damages §§ 40 to 42, 165 to 199.

Benjamin B. Coulter, No Longer as Good as Dead: The Continued Revival of Alabama's Medical and Hospital Expenses Exception to the Collateral Source Rule a Decade After Marsh, 42 Cumb. L. Rev. 299 (2011–2012).

Danielle A. Daigle, The Collateral Source Rule in Alabama: A Practical Approach to Future Application of the Statutes Abrogating the Doctrine, 53 Ala. L. Rev. 1249 (Summer 2002).

**APJI 11.16 LOSS OF INCOME
(FROM TIME OF INJURY TO TIME
OF TRIAL) [PL]**

(Name of plaintiff) says (name of defendant)'s conduct caused (him/her) to lose income. If (name of plaintiff) proved to your reasonable satisfaction that (name of defendant)'s conduct caused (him/her) lost income, then you must determine an amount of money to compensate (him/her) for the loss from the date of injury to this trial.

The amount to compensate for loss of income is the amount of money that (name of plaintiff) is reasonably certain to have received during the time lost from work. To decide the amount, consider (his/her) past income, how (he/she) usually spent (his/her) time before the injury, and (his/her) inability to carry on (his/her) work.

(You can award lost profits only if they were earned in the past through (name of plaintiff)'s personal effort, skill or ability.)

Revised August 9, 2019

Notes on Use

Use this instruction when the plaintiff claims that he/she has lost income earned by plaintiff's personal efforts, skill or ability as the result of personal injury. If the plaintiff claims loss of future earnings, give APJI 11.17.

The committee uses the word "income" in a generic sense. The term includes, but is not limited to, wages, earnings, profits, commissions, salary, benefits.

"The general rule in Alabama is that receipt of a salary by an injured employee from his employer precludes recovery of lost wages against a third party. *Montgomery & E. Ry. Co. v. Mallette*, 92 Ala. 209, 9 So. 363 (1891); *Central of Georgia Ry. Co. v. Storrs*, 169 Ala. 361, 53 So. 746 (1910); *Travis v. Louisville & N.R. Co.*, 183 Ala. 415, 62 So. 851 (1913); *Mackintosh Co. v. Wells*, 218 Ala.

260, 118 So. 276 (1928); *Whiddon v. Malone*, 220 Ala. 220, 124 So. 516 (1929). However, this rule does not extend to outright gifts or donations by an employer. *Bachelder v. Morgan*, 179 Ala. 339, 60 So. 815 (1912).” *Harley-Davidson, Inc. v. Toomey*, 521 So. 2d 971, 975, Prod. Liab. Rep. (CCH) P 11746 (Ala. 1988).

References

Ex parte Courtney, 937 So. 2d 1060 (Ala. 2006).

Lindy Mfg. Co. v. Twentieth Century Marketing, Inc., 706 So. 2d 1169 (Ala. 1997).

Harley-Davidson, Inc. v. Toomey, 521 So. 2d 971, Prod. Liab. Rep. (CCH) P 11746 (Ala. 1988).

Bishop v. Poore, 475 So. 2d 486 (Ala. 1985).

Carnival Cruise Lines, Inc. v. Snoddy, 457 So. 2d 379 (Ala. 1984).

Fitzpatrick v. Dean, 278 Ala. 284, 177 So. 2d 909 (1965) (lost profits earned as a result of plaintiff’s personal efforts, skill or ability).

West’s Key Number Digest, Damages ¶37, 59, 99 and 127.45.

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 40.05 (5th ed. 2010).

Jenelle Mims Marsh, *Alabama Law of Damages* § 36:4 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 136 to 164.

See, John J. Quinn, *Recovery for Loss of Time as an Element of Damages*, 6 Ala. L. Rev. 79, 83 (1953) (“In the case of loss of time, the loss is the value of the time, . . .”).

APJI 11.17 LOSS OF FUTURE EARNINGS [PL]

(Name of plaintiff) says (his/her) injury will cause (him/her) the loss of future earnings.

To decide the amount to compensate (name of plaintiff) for the loss of future earnings you must first determine the effect, if any, the injury has upon (his/her) (future earnings). To decide this question, consider the following:

(Name of plaintiff)'s (physical/mental) health and ability before the injury and what they are now;

The nature, type and degree of (his/her) injury; and,

Whether the injury is permanent, or if not permanent, how long it will last.

Any other circumstances proved by the evidence that you find helps you decide whether or not (name of plaintiff) has a loss of future earnings.

If you decide that (name of plaintiff) will lose future earnings, you must then determine the amount (he/she) is reasonably certain to lose and reduce that amount to its present cash value.

If you determine that (name of plaintiff) will lose future earnings, but (he/she) did not establish the amount of the loss, you will award (name of plaintiff) nominal damages.

Revised August 9, 2019

Notes on Use

Use this instruction when the plaintiff claims loss of future earnings caused by physical or mental injury, but do not use this instruction in a retaliatory discharge case. See *Merchants FoodService v. Rice*, 286 So. 3d 681, 690-694, 697-701 (Ala. 2019). If a mortality table is in evidence, instruct using APJI 11.26.

Note the distinction between this instruction and APJI 11.16,

which instructs on loss of income, or as sometime expressed in early Alabama cases, loss of time from work. See *Mackintosh Co. v. Wells*, 218 Ala. 260, 118 So. 276 (1928).

Cases that involve federal substantive law may require an additional jury instruction on the method of computing present value. For example, in cases when seamen file federal maritime claims under the Jones Act or general maritime law, *J.F.P. Offshore, Inc. v. Diamond*, 600 So. 2d 1002 (Ala. 1992), the jury is instructed on the below-market discount rate method for determining the present value of future lost wages.

References

Hathcock v. Wood, 815 So. 2d 502 (Ala. 2001).

Gold Kist, Inc. v. Griffin, 657 So. 2d 826, 10 I.E.R. Cas. (BNA) 122 (Ala. 1994) (retaliatory discharge).

Clark v. Container Corp. of America, Inc., 589 So. 2d 184 (Ala. 1991) (holding the first sentence of Ala. Code § 6-11-1 (1975) (West's Alabama Code), and all of Ala. Code §§ 6-11-3, 6-11-4, and 6-11-5 (1975) (West's Alabama Code) violate Ala. Const art. I, §§ 11 & 13).

Mullins v. Summers, 485 So. 2d 1126 (Ala. 1986) (per curiam) (refusal to require expert testimony on mathematical method to reduce award of future earnings to present value is not error).

Bishop v. Poore, 475 So. 2d 486 (Ala. 1985).

Carnival Cruise Lines, Inc. v. Snoddy, 457 So. 2d 379 (Ala. 1984).

Birmingham Electric Co. v. Cleveland, 216 Ala. 455, 113 So. 403 (1927).

Abex Corp. v. Coleman, 386 So. 2d 1160 (Ala. Civ. App. 1980).

West's Key Number Digest, Damages ☞38, 99.

2 Michael L. Roberts, *Alabama Tort Law* § 40.05 (6th ed. 2015).

Jenelle Mims Marsh, *Alabama Law of Damages* § 36:4 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 136 to 164.

**APJI 11.18 LOSS OF FUTURE EARNING
CAPACITY [PL]**

(Name of plaintiff) says (name of defendant)'s conduct impaired (name of plaintiff)'s future earning capacity. Impaired earning capacity means a person's future ability to earn is diminished.

You must first determine if (name of plaintiff)'s injury is permanent. If you determine that (name of plaintiff)'s injury is not permanent, you cannot award damages for loss of future earning capacity. If you determine the injury is permanent, then you will determine whether the injury impaired (name of plaintiff)'s future earning capacity.

The measure of damages for impaired future earning capacity is the difference between (name of plaintiff)'s earning capacity before (his/her) injury and (his/her) earning capacity after the injury. Loss or impairment of earning capacity is not measured by (name of plaintiff)'s actual lost earnings, if any.

To decide the amount to compensate (name of plaintiff) for the loss of (his/her) future earning capacity, you must first determine the effect, if any, the injury has upon (name of plaintiff)'s future earning capacity. To decide this question, consider the following:

(Name of plaintiff)'s age.

The nature and extent of (name of plaintiff)'s injury.

The type(s) of jobs and wages earned by (name of plaintiff), if any, before and at the time of the injury. The fact that (name of plaintiff) earns the same or more now than (he/she) did when injured does not, standing alone, mean (he/she) does not have a loss of earning capacity.

(Name of plaintiff)'s past (physical/mental) condition.

(Name of plaintiff)'s present (physical/mental) condition.

(Name of plaintiff)'s education, experience, and training.

(Name of plaintiff)'s (life expectancy/work-life expectancy).

Any other circumstances proved by the evidence that you find helps you decide whether or not (name of plaintiff) has diminished earning capacity.

If you determine (name of plaintiff) has diminished future earning capacity and (name of defendant)'s conduct caused that loss, you must calculate the amount to award. When calculating the amount of the award, you must determine the length of time the loss of capacity will last.

(Name of plaintiff)'s wages or earnings before or at the time of the injury compared to what, if anything, (name of plaintiff) earned after the injury does not, considered alone, establish the measure of damages. The comparison merely serves as a useful aid to your determination of the amount of damages if you find that (name of plaintiff) has a loss of earning capacity.

The law does not provide a legal rule or yardstick that tells you how much to award for loss of earning capacity. But, (name of plaintiff) must prove facts that allow you to determine, with reasonable certainty, the amount to award. The fact that (name of plaintiff) has a permanent injury, without more, does not establish that (he/she) has diminished earning capacity.

If you determine that (name of plaintiff)'s future earning capacity is diminished, but (he/she) did not establish the amount of the loss, you will award (name of plaintiff) nominal damages.

Approved August 9, 2019

Notes on Use

Use this instruction when the defendant's conduct caused the

plaintiff physical or mental injury, and the injury caused loss of earning capacity for, at least, some period in the future.

The instruction is not intended for use in a retaliatory discharge case because in those cases the harm is the stigma or taint that accompanies a termination that reduces the plaintiff's loss of access to the labor market or makes him or her less marketable as an employee. *Merchants FoodService v. Rice*, 286 So. 3d 681 (Ala. 2019); *Guyoungtech USA, Inc. v. Dees*, 156 So.3d 374, 380 (Ala. 2014) (plurality opinion).

Loss of future earnings and loss of future earning capacity are separate elements of damages, but there is danger of double recovery if the trial judge instructs the jury on both.

The list of factors the jury may consider when determining whether or not the plaintiff has diminished future earning capacity are based on the Alabama appellate court reports. Other factors are stated in the following secondary sources: C. J. S., *Damages* § 162; *Am. Jur. 2d, Damages* §§ 159, 160, 169, 754; *Restatement (Torts) Second* § 924 cmt. c (1979); 2 *Stuart M. Speiser, et al., American Law of Torts* § 8:27 (Mar. 2019).

The trial judge should instruct only on those factors that the evidence shows or the jury can reasonably infer from the evidence.

APJI 11.12, Permanent Injury or Disfigurement.

References

Hathcock v. Wood, 815 So.2d 502, 509 (Ala. 2001).

Collins v. Shelley By and Through Shelley, 514 So.2d 1358 (Ala. 1987).

Mullins v. Summers, 485 So.2d 1126 (Ala. 1986) (per curiam).

Carnival Cruise Lines, Inc. v. Snoddy, 457 So.2d 379, 381 (Ala. 1984).

Feazell v. Campbell, 358 So.2d 1017 (Ala. 1978).

Beloit Corp. v. Harrell, 339 So.2d 992, 998 (Ala. 1976).

Allison v. Acton-Etheridge Coal Co., Inc., 289 Ala. 443, 268 So.2d 725 (1972).

DAMAGES

APJI 11.18

Birmingham Electric Co. v. Cochran, 242 Ala. 673, 8 So.2d 171 (1942).

City of Birmingham v. Levens, 241 Ala. 47, 200 So. 888 (1941).

Ensley Holding Co. v. Kelley, 229 Ala. 650, 158 So. 896 (1934).

Walker County v. Davis, 221 Ala. 195, 128 So. 144 (1930).

Mackintosh Co. v. Wells, 218 Ala. 260, 118 So. 276 (1928).

Gray v. Cooper, 216 Ala. 684, 114 So. 139 (1927).

Brilliant Coal Co. v. Barton, 205 Ala. 89, 87 So. 830 (1920).

Birmingham Ry., Light & Power Co. v. Colbert, 190 Ala. 229, 237, 67 So. 513, 515 (1914).

Birmingham Ry., Light & Power Co. v. Simpson, 177 Ala. 475, 483, 59 So. 213, 216 (1912).

City Council of Montgomery v. Shirley, 159 Ala. 239, 48 So. 679 (1908).

Town of Elba v. Bullard, 152 Ala. 237, 44 So. 412 (1907).

West's Key Number Digest, Damages ☞30, 38, 100, 127.58 – .68, 145, 187.

Jenelle Mims Marsh, Alabama Law of Damages § 36:4 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 159, 166, 169, 754.

See, Howard W. Brill, et al., Arkansas Law of Damages § 29:4 (Nov. 2018).

APJI 11.19 to 11.21

Reserved

**APJI 11.22 DAMAGES OTHER THAN
PERSONAL INJURY [PL]**

(Name of plaintiff) also asks for damages for the following:

(Loss of consortium.)

(Loss of services of (his/her) minor child, (name of minor).)

(Bills for medical care, treatment, and services of (his/her) (spouse/minor child) that (he/she) (has paid) (owes and will have to pay) (and that (he/she) will have to pay in the future).)

(Property damage.)

(Loss of use of (his/her) (car/truck/etc.).)

(Others as claimed.)

Notes on Use

Use this instruction to summarize the other types of damages the plaintiff claims. The types of damages are listed in the order as they follow in this chapter.

APJI 11.23 CONSORTIUM [PL]

(Name of plaintiff spouse) says that (name of physically injured plaintiff's physical injuries caused (him/her) to lose (name of physically injured plaintiff's consortium. If you find for (name of physically injured plaintiff), you then may consider the claim for loss of consortium.

(Name of plaintiff spouse) must prove (show) to your reasonable satisfaction that (he/she) lost the consortium, and the loss was caused by (name of physically injured plaintiff's physical injury (injuries).

Consortium is (his/her) right to the love, company, fellowship, cooperation, assistance, society, affection, services, and comfort of (his/her) spouse, and (his/her) right to the continuation of the normal marital relationship.

If you find for (name of plaintiff spouse), you must determine the amount of money that will reasonably compensate (him/her) for the loss of (name of physically injured plaintiff's consortium. There is no legal rule or yardstick that tells you how much money to award for loss of consortium. You must consider all the evidence, and you should take into account the length of time of the loss and whether the loss is reasonably certain to last into the future.

Notes on Use

Use this instruction when either spouse claims for loss of consortium.

References

Ex parte N.P., 676 So. 2d 928 (Ala. 1996).

Mattison v. Kirk, 497 So. 2d 120 (Ala. 1986), overruled on other grounds by, Carbon Hill Mfg., Inc. v. Moore, 602 So. 2d 354 (Ala. 1992) and King v. National Spa and Pool Institute, Inc., 607 So. 2d 1241 (Ala. 1992) (common law marriage sufficient, ceremonial marriage not required).

TG&Y Stores v. Atchley, 414 So. 2d 912 (Ala. 1982).

Swartz v. U. S. Steel Corp., 293 Ala. 439, 304 So. 2d 881 (1974).

Cook v. Sweatt, 282 Ala. 177, 209 So. 2d 891 (1965).

Hinson v. King, 603 So. 2d 1104 (Ala. Civ. App. 1992).
“Consortium is defined as ‘conjugal fellowship of husband and wife, and the right of each other to the company, society, co-operation, affection, and aid of the other in every conjugal relation.’” (quoting Black’s Law Dictionary, 280 (5th ed. 1979)).

Phillips v. Tays, 555 So. 2d 1096 (Ala. Civ. App. 1989) (no fixed standard for award of damages).

Montgomery v. Stephan, 359 Mich. 33, 36, 101 N.W.2d 227, 228 (1960) “[A]ll that consortium means is conjugal fellowship”.

West’s Key Number Digest, Husband & Wife ⇨209(1) to 209(4), 235; Damages ⇨96, 99, 127.72 to.74.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.07 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 36.7 (6th ed. 2012).

Am. Jur. 2d, Husband and Wife §§ 7, 212 to 235.

8 Words & Phrases, Consortium.

Alabama Code § 30-4-15 (1975) (West’s Alabama Code).

**APJI 11.24 MEDICAL EXPENSES FOR SPOUSE
OR CHILD [PL]**

(Name of plaintiff) says that (name of defendant)'s conduct caused harm to (name of minor child/name of spouse) and (he/she) had to receive medical care, treatment and services. (Name of plaintiff) further says that (he/she) has bills for the medical care, treatment, and services for (name of minor child/spouse) that (he/she) (has paid) (will have to pay) (and that (he/she) will have to pay in the future).

The measure of damages for medical expenses is:

All reasonable expenses for medical care, treatment, and services that (name of defendant)'s conduct caused (name of plaintiff) to pay, or that (he/she) owes and will have to pay.

You must decide if the treatment is reasonably necessary, that the expenses for it are reasonable, and the need for the treatment is caused by (name of defendant)'s conduct.

(When there is evidence of third party payment of medical expenses, give the following as appropriate.)

There is evidence that a third party (satisfied) (paid) the medical expenses, and (name of defendant) asks that you reduce the amount of any award for medical expenses.

(When there is evidence of cost of obtaining reimbursement, give the following as appropriate.)

There is also evidence of the cost of obtaining reimbursement or payment of medical expenses.

(When there is evidence of subrogation, give the following as appropriate.)

There is also evidence that (name of plaintiff) will have to pay back from any award the money (name of third party provider) paid for the medical expenses.

(When any of the above additional paragraphs are given, give the following also.)

You may consider all this evidence in determining the amount of your award.

Approved October 11, 2013

Revised May 6, 2016

Notes on Use

Use this instruction when the plaintiff father or mother, or spouse, claims damages for the medical expenses for the care of a minor child or their spouse, and when defendant puts on evidence that all or some of the medical expenses were paid by a third party provider.

The references are to cases that state the law about the measure of damages for medical expenses and cases that discuss the collateral source rule and its abrogation by Ala. Code § 12-21-45 (1975) (West's Alabama Code). *Senn v. Alabama Gas Corp.*, 619 So. 2d 1320 (Ala. 1993); *Melvin v. Loats*, 23 So. 3d 666 (Ala. Civ. App. 2009); *Crocker v. Grammer*, 87 So. 3d 1190 (Ala. Civ. App. 2011), cert. denied, No. 1101517 (Ala. Jan. 13, 2012), holds that the Alabama Rules of Evidence did not repeal Ala. Code § 12-21-45.

References

Ala. Code § 6-5-390 (1975) (West's Alabama Code) (right of action for minor child's personal injury).

Ala. Code § 12-21-45 (1975) (West's Alabama Code).

Arthur v. Bolen, 41 So. 3d 745 (Ala. 2010).

Broughton v. Kilpatrick, 362 So. 2d 865 (Ala. 1978).

Cabaniss v. Cook, 353 So. 2d 784 (Ala. 1977).

Thorne v. Odom, 349 So. 2d 1126 (Ala. 1977).

Smith v. Richardson, 277 Ala. 389, 171 So. 2d 96 (1965).

Crocker v. Grammer, 87 So. 3d 1190 (Ala. Civ. App. 2011), cert. denied, No. 1101517 (Ala. Jan. 13, 2012).

Daniels v. Kapoor, 64 So. 3d 62 (Ala. Civ. App. 2010).

Bergob v. Scrushy, 855 So. 2d 523 (Ala. Civ. App. 2002).

Blue Cross and Blue Shield of Alabama v. Bolding by Bolding, 465 So. 2d 409 (Ala. Civ. App. 1984).

United States Fidelity & Guaranty Co. v. Baker, 24 Ala. App. 274, 134 So. 894 (1931) (wife's medical expenses).

Shelley v. White, 711 F. Supp. 2d 1295 (M.D. Ala. 2010).

West's Key Number Digest, Damages ☞37, 43, 99, 101, 127.75.

West's Key Number Digest, Parent and Child ☞7, 7(1).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.03 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 20:04, 36:3 (6th ed. 2010).

Am. Jur. 2d, Parent and Child §§ 117, 118, 122 to 125.

Benjamin B. Coulter, No Longer as Good as Dead: The Continued Revival of Alabama's Medical and Hospital Expenses Exception to the Collateral Source Rule a Decade After Marsh, 42 Cumb. L. Rev. 299 (2011-2012).

Danielle A. Daigle, The Collateral Source Rule in Alabama: A Practical Approach to Future Application of the Statutes Abrogating the Doctrine, 53 Ala. L. Rev. 1249 (Summer 2002).

**APJI 11.25 PARENT'S NURSING SERVICES
FOR CHILD—VALUE [PL]**

(Name of plaintiff) claims damages for the nursing care (he/she) provided to (name of minor child).

The measure of damages for the nursing care for (name of minor child) is the reasonable monetary value of the services.

You must decide if the services to (name of minor child) were necessary, the reasonable monetary value of the services, and if the need for the services was caused by (name of defendant)'s conduct.

Notes on Use

A parent's lost time from work and lost wages are not compensable.

References

Ala. Code § 6-5-390 (1975) (West's Alabama Code) (right of action for minor child's personal injury).

Williston v. Ard, 611 So. 2d 274 (Ala. 1992).

Hannon v. Duncan, 594 So. 2d 85 (Ala. 1992).

Smith v. Richardson, 277 Ala. 389, 171 So. 2d 96 (1965).

Bryan v. Stewart, 194 Ala. 353, 70 So. 123 (1915).

West's Key Number Digest, Damages ☞99; Parent and Child ☞7, 7(1).

2 Michael J. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.03 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 36:3 (6th ed. 2012).

Am. Jur. 2d, Damages § 175.

**APJI 11.26 LOSS OF SERVICES—MINOR
CHILD TEMPORARY DISABILITY
[PL]**

(Name of plaintiff) says (he/she) lost the services of (name of minor child) because of (name of defendant)'s conduct.

The measure of damages is the reasonable monetary value of (name of child)'s services.

You must decide the reasonable monetary value of (name of child)'s services, and if the loss was caused by (name of defendant)'s conduct.

Notes on Use

Use this instruction when a parent claims loss of the minor child's services.

References

Ala. Code § 6-5-390 (1975) (West's Alabama Code) (right of action for minor child's personal injury).

Williston v. Ard, 611 So.2d 274 (Ala. 1992).

Hannon v. Duncan, 594 So.2d 85 (Ala. 1992).

Smith v. Richardson, 277 Ala. 389, 171 So.2d 96 (1965).

Bryan v. Stewart, 194 Ala. 353, 70 So. 123 (1915).

Birmingham Ry., Light & Power Co. v. Baker, 161 Ala. 135, 49 So. 755 (1909).

West's Key Number Digest, Damages ☞37, 43, 99, 101, 127.72, 127.73, 127.75; Parent and Child ☞7, 7(1).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.08 (5th ed. 2010).

Jenelle M. March, Alabama Law of Damages § 36:8 (6th ed. 2012).

APJI 11.26

ALABAMA PATTERN JURY INSTRUCTIONS

Am. Jur. 2d, Damages § 163, 164.

**APJI 11.27 LOSS OF SERVICES—MINOR
CHILD PERMANENT DISABILITY
[PL]**

(Name of plaintiff) says that (name of minor child) is permanently harmed because of (name of defendant)'s conduct and (name of plaintiff) has lost and will lose the child's services.

The measure of damages is the reasonable monetary value of (name of child)'s services until the child is 19 years old.

You must decide if (name of child) was permanently harmed, the reasonable monetary value of the child's services, and if the loss was caused by (name of defendant)'s conduct.

Notes on Use

Use this instruction when a child has a permanent injury and a parent claims the loss of the child's services.

References

Ala. Code § 6-5-390 (1975) (West's Alabama Code) (right of action for minor child's personal injury).

Smith v. Richardson, 277 Ala. 389, 171 So.2d 96 (1965).

Birmingham Ry., Light & Power Co. v. Chastain, 158 Ala. 421, 48 So. 85 (1908).

West's Key Number Digest, Damages ⇨37, 43, 99, 101, 127.72, 127.75.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.08 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 36:8 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 163, 164.

APJI 11.27**ALABAMA PATTERN JURY INSTRUCTIONS**

Am. Jur. 2d, Parent and Child §§ 23, 97.

Ala. Code § 26-1-1(a) (1975) (West's Alabama Code) (age of majority is 19), the “[f]inal placement and text of 2019 legislation is subject to editorial action of the Code Commissioner.”

APJI 11.28 WRONGFUL DEATH [PL]

This is a claim for the wrongful death of (name of decedent).

The damages in this case are punitive and not compensatory. Punitive damages are awarded to preserve human life, to punish (name of defendant) for (his/her/its) wrongful conduct, and to deter or discourage (name of defendant) and others from doing the same or similar wrongs in the future.

The amount of damages must be directly related to (name of defendant)'s culpability, and by that I mean how bad (his/her) wrongful conduct was. You do not consider the monetary value of (name of decedent)'s life because the damages are not to compensate (name of plaintiff) or (name of decedent)'s family from a monetary standpoint because of (his/her) death.

The amount you award is within your discretion based on the evidence and the guidelines in this instruction.

Notes on Use

Use this instruction in all claims for wrongful death.

References

Ala. Code § 6-5-410 (1975) (West's Alabama Code).

Ala. Code § 6-5-391 (1975) (West's Alabama Code) (right of action for death of minor child).

Pollard v. H.C. Partnership, Ms. 1180795, 2020 WL 1226488 (Ala. Mar. 13, 2020).

Hamilton v. Scott, 278 So. 3d 1180 (Ala. 2018) (per curiam).

Boudreaux v. Pettaway, 108 So. 3d 486 (Ala. 2012), rev'd in part, Gillis v. Frazier, 214 So. 3d 1127 (Ala. 2014).

Mack v. Carmack, 79 So. 3d 597 (Ala. 2011).

Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077 (Ala. 2007) (Lyons, J., dissenting).

Trott v. Brinks, Inc., 972 So. 2d 81 (Ala. 2007).

Ex parte Cincinnati Ins. Co., 689 So. 2d 47 (Ala. 1997).

Campbell v. Williams, 638 So. 2d 804 (Ala. 1994).

Alabama Power Co. v. Turner, 575 So. 2d 551 (Ala. 1991).

Industrial Chemical & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1988).

Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974).

Airheart v. Green, 267 Ala. 689, 104 So. 2d 687 (1958).

West's Key Number Digest, Death ☞78, 81, 95.

2 Michael J. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 33.01 to 33.14 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 37.1 to 37.15 (6th ed. 2012).

APJI 11.29 MORTALITY TABLES [PL]

Mortality tables are a way to determine how long a person of ordinary health will probably live. They can help you in awarding damages if you find that (name of plaintiff) has permanent injuries. The tables are an aid and they are not the final word. They should be considered by you together with the other evidence to help you decide how long (name of plaintiff) will probably live.

Notes on Use

Use this instruction only when mortality tables are in evidence.

References

Ozment v. Wilkerson, 646 So. 2d 4 (Ala. 1994) (not admissible in wrongful death action).

Drummond Co., Inc. v. Self, 622 So. 2d 336 (Ala. 1993).

Clark v. Hudson, 265 Ala. 630, 93 So. 2d 138 (1956).

Louisville & N.R. Co. v. Steel, 257 Ala. 474, 59 So. 2d 664 (1952).

Ala. Code §§ 35-16-3, 35-16-4 (1975) (West's Alabama Code) (mortality tables are required to be published following each regular session of the legislature).

II Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 259.01(1) (6th ed. 2009).

Am. Jur. 2d, *Damages* §§ 174, 176.

APJI 11.30 to 11.33**Reserved**

APJI 11.34 PERSONAL PROPERTY [PL]

(Name of plaintiff) says (his/her/its) (describe the personal property) was harmed because of (name of defendant)'s conduct.

The measure of damages is the difference between the reasonable market value of the (describe the property) immediately before the harm and its reasonable market value immediately after the harm.

You must decide if (name of defendant)'s conduct harmed the property. If it did, you must then determine the difference, if any, between the reasonable market value of the property immediately before the harm and the reasonable market value immediately after the harm.

Notes on Use

Use this instruction when the plaintiff claims damage to personal property. However, this instruction states the general rule, and the difference in market value is not the absolute measure of compensable damages, but it is the principal element. *Alford v. Jones*, 531 So. 2d 659, 660 (Ala. 1988). When evidence about the cost to repair is introduced, use APJI 11.35.

Use APJI 11.37 when the claim is damages to a commercial vehicle.

References

Martin v. Scaife, 587 So. 2d 995 (Ala. 1991).

Alford v. Jones, 531 So. 2d 659 (Ala. 1988).

Lynn Strickland Sales and Service, Inc. v. Aero-Lane Fabricators, Inc., 510 So. 2d 142 (Ala. 1987) (overruled on other grounds by, *Alfa Mut. Ins. Co. v. Roush*, 723 So. 2d 1250 (Ala. 1998)).

Robbins v. Voigt, 280 Ala. 207, 191 So. 2d 212 (1966).

Wert v. Geeslin, 260 Ala. 701, 69 So. 2d 724 (1954).

Housing Authority of Birmingham Dist. v. Title Guarantee

Loan & Trust Co., 243 Ala. 157, 8 So. 2d 835 (1942) (the terms fair market value and reasonable market value of real property are substantially synonymous).

Lary v. Gardener, 908 So. 2d 955 (Ala. Civ. App. 2005).

Sunshine Homes v. Hogan, 408 So. 2d 149 (Ala. Civ. App. 1981).

Hannah v. Brown, 400 So. 2d 410 (Ala. Civ. App. 1981) (rule regarding loss of use of personal auto mobile during reasonable period of repair).

Arrick v. Fanning, 35 Ala. App. 409, 47 So. 2d 708 (1950).

West's Key Number Digest, Damages ⇌103, 105, 113, 137, 139, 174(1), 217.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Law of Damages § 41.02 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 36:5, 36:50 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 279 to 299, 772 to 775, 790, 810.

A.L.R. Library

Damages for killing or injuring dog, 61 A.L.R.5th 635.

Comment Note.—Measure of damages for conversion of corporate stock or certificate, 31 A.L.R.3d 1286.

Measure of damages for injury to or destruction of shade or ornamental tree or shrub, 95 A.L.R.3d 508.

Measure of damages for wrongful removal of earth, sand, or gravel from land, 1 A.L.R.3d 801.

Measure of damages for destruction of or injury to fruit, nut, or other productive trees, 90 A.L.R.2d 800.

Measure of damages for conversion or loss of commercial paper, 85 A.L.R.2d 1349.

Measure of damages for destruction of or injury to airplane, 73 A.L.R.2d 719.

Recovery by chattel mortgagee or mortgagor, or person stand-

ing in his shoes, against third person for damage or destruction of property, 67 A.L.R.2d 599.

Recovery by conditional seller or buyer, or person standing in his shoes, against third person for damages or destruction of property, 67 A.L.R.2d 582.

Recovery of value of use of property wrongfully attached, 45 A.L.R.2d 1221.

Deviation by carrier in transportation of property, 33 A.L.R.2d 145.

Damages recoverable from warehouseman for negligence causing injury to, or destruction of, goods of a perishable nature, 32 A.L.R.2d 910.

Comment Note.—Recovery for mental shock or distress in connection with injury to or interference with tangible property, 28 A.L.R.2d 1070.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 A.L.R.2d 12.

Measure of damages for conversion or loss of, or damage to, personal property having no market value, 12 A.L.R.2d 902.

APJI 11.35 PERSONAL PROPERTY—COST TO REPAIR [PL]

You have evidence about the cost to repair the (describe the property). You may consider this evidence when deciding the extent of the harm to the property and when deciding its market value. However, the correct measure of damages is the difference between the reasonable market value immediately before the harm and the reasonable market value immediately after the harm.

Notes on Use

Use this instruction when evidence of repair expense has been presented. It should be preceded by APJI 11.34. This instruction is intended to eliminate confusing language in former APJI 11.24 (1993).

Use APJI 11.37 when the claim is damages to a commercial vehicle.

References

Martin v. Scaife, 587 So. 2d 995 (Ala. 1991).

Alford v. Jones, 531 So. 2d 659 (Ala. 1988).

Robbins v. Voigt, 280 Ala. 207, 191 So. 2d 212 (1966).

Hunt v. Ward, 262 Ala. 379, 79 So. 2d 20 (1955), rev'd in part, Ex parte S & M, LLC, 120 So. 3d 509 (Ala. 2012).

Mobile Light & R. Co. v. Gadik, 211 Ala. 582, 100 So. 837 (1924).

Lary v. Gardener, 908 So. 2d 955 (Ala. Civ. App. 2005).

Wambles v. Davis, 405 So. 2d 945 (Ala. Civ. App. 1981).

Hannah v. Brown, 400 So. 2d 410 (Ala. Civ. App. 1981).

Fuller v. Martin, 41 Ala App 160, 125 So. 2d 4 (1960), rev'd in part, Ex parte S & M, LLC, 214 So. 3d 1127 (Ala. 2014).

Arrick v. Fanning, 35 Ala. App. 409, 47 So. 2d 708 (1950).

APJI 11.35**ALABAMA PATTERN JURY INSTRUCTIONS**

West's Key Number Digest, Damages ☞174 (1).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 41.02 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 36:5, 36:50 (6th ed. 2012).

Am. Jur. 2d, Damages § 288.

A.L.R. Library

Recovery of value of use of property wrongfully attached, 45 A.L.R.2d 1221.

**APJI 11.36 DAMAGES—PERSONAL VEHICLE
[PL]**

(Name of plaintiff) says (his/her) personal vehicle was harmed because of (name of defendant)'s conduct.

The measure of damages is the difference between the reasonable market value of the (describe the property) immediately before the harm and its reasonable market value immediately after the harm. In addition, (name of plaintiff) can be awarded damages for (the cost of towing (storage)) (loss of the vehicle's use) and other reasonable expense caused by harm to the vehicle.

The measure of damages for loss of use is the reasonable cost to rent a similar vehicle for a reasonable period of time to repair (name of plaintiff's) vehicle. Damages for loss of use can be awarded even if (name of plaintiff) does not rent a substitute vehicle.

You must decide if (name of defendant)'s conduct harmed (name of plaintiff)'s personal vehicle. If it did, you must then determine the difference, if any, between the reasonable market value of the property immediately before the harm and the reasonable market value immediately after the harm together with the other actual loss, if any.

Notes on Use

Use this instruction when plaintiff claims damages to his or her personal vehicle when it can be repaired.

See APJI 11.35, Cost to Repair.

References

Alford v. Jones, 531 So. 2d 659 (Ala. 1988).

Cocke v. Edwards, 215 Ala. 8, 108 So. 857 (1926).

Mobile Light & R. Co. v. Gadik, 211 Ala. 582, 100 So. 837 (1924).

APJI 11.36**ALABAMA PATTERN JURY INSTRUCTIONS**

Hannah v. Brown, 400 So. 2d 410 (Ala. Civ. App. 1981).

West's Key Number Digest, Damages ¶139.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 41.01 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 30.50 (6th ed. 2012).

**APJI 11.37 GENERAL RULE COMMERCIAL
VEHICLE-REPAIRS AND LOSS OF
USE [PL]**

(Name of plaintiff) says (name of defendant)'s conduct harmed (name of plaintiff)'s (describe commercial vehicle).

The measure of damages is the reasonable market value of loss of the use of the (describe vehicle) for the time reasonably necessary for its repair plus the reasonable cost of repair, to substantially restore the vehicle to its former condition.

You must decide if (name of defendant)'s conduct harmed the vehicle, and if so, then determine the reasonable market value of the loss of use and the reasonable cost to repair.

Notes on Use

This instruction states the basic rule of damages for loss of use of a commercial vehicle. To aid the jury, it is important that the court explain how the plaintiff claims the loss of hire or use, e.g., the plaintiff lost rental income on the truck or plaintiff could not transport passengers.

Wilson & Co. v. Sims, 250 Ala. 414, 34 So. 2d 689 (1948) holds that the damages are the reasonable cost of repair to “substantially restore the vehicle to its former condition” plus the reasonable market value of the vehicle’s hire or use, but lost profits are not recoverable. However, lost profits may be recoverable if the plaintiff proves that a substitute vehicle was not available while plaintiff’s vehicle was being repaired. Cf, *Taylor v. Mason*, 390 So. 2d 1046 (Ala. 1980) (plaintiff did not introduce evidence that a substitute truck was not available while his truck was being repaired).

Another exception to the general rule is stated in *Coffee County Com’n v. Smith*, 480 So. 2d 1194 (Ala. 1985). A county-maintained bridge collapsed when a combine was driven over it. The combine was repaired but never worked correctly. The court affirmed the trial court’s judgment that included loss of value, the cost of repair, and loss of use during repair.

References

Cummins Engine Co., Inc. v. Invictus Motor Freight, Inc., 641 So. 2d 761 (Ala. 1994) (dictum).

Coffee County Com'n v. Smith, 480 So. 2d 1194 (Ala. 1985).

Taylor v. Mason, 390 So. 2d 1046 (Ala. 1980).

Dean v. Johnston, 281 Ala. 602, 206 So. 2d 610 (1968).

Wilson & Co. v. Sims, 250 Ala. 414, 34 So. 2d 689 (1948).

Plylar v. Jones, 207 Ala. 372, 92 So. 445 (1922) (plaintiff used car to carry passengers for hire).

Southern Ry. Co. v. Reeder, 152 Ala. 227, 44 So. 699 (1907) (steamboat struck drawbridge).

Etno, Inc. v. Rivers, 644 So. 2d 3 (Ala. Civ. App. 1994) (plaintiff does not have to repair vehicle).

Kemp's Garage, Inc. v. Poole Truck Lines, Inc., 606 So. 2d 144 (Ala. Civ. App. 1992).

Rowell v. Treadwell Ford, Inc., 511 F.2d 164 (5th Cir. 1975) (plaintiff's damages are net amount from truck lease).

West's Key Number Digest, Damages ⇨103, 105, 113, 139, 174 (1), 217.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 41.02 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 36:5, 36:50 (6th ed. 2012).

Am. Jur. 2d, Damages § 772 to 775, 810.

APJI 11.38 VEHICLE—TOTAL LOSS [PL]

(Name of plaintiff) says (name of defendant)'s conduct totaled (name of plaintiff)'s (describe the vehicle).

(Name of plaintiff)'s damage is the reasonable market value of the (describe the vehicle) immediately before the loss less its salvage value, if any, and the reasonable market value of loss of use for the time reasonably necessary to get a replacement vehicle.

You must decide if (name of defendant)'s conduct harmed the vehicle, and, if so, then determine its reasonable market value less salvage value, if any. You must also determine the amount of money that compensates (name of plaintiff) for its loss of use during the period of time reasonably necessary to get a replacement vehicle. The total is the amount of (name of plaintiff)'s damage.

Approved January 11, 2013

Notes on Use

Use this instruction when a personal or commercial vehicle is a total loss.

The instruction corresponds to the change in law announced in *Ex parte S & M, LLC*, 120 So. 3d 509 (Ala. 2012). *Ex parte S & M, LLC* overruled *Hunt v. Ward*, 262 Ala. 379, 79 So. 2d 20 (1955), *Fuller v. Martin*, 41 Ala. App. 160, 125 So. 2d 4 (1960), and *Lary v. Valiant Ins. Co.*, 864 So. 2d 1105 (Ala. Civ. App. 2002) to the extent these decisions conflict with the new rule of damages.

References

Ex parte S & M, LLC, 120 So. 3d 509 (Ala. 2012).

West's Key Number Digest, Damages ⇨115.

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 41.02 (5th ed. 2010).

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 2:1, 36:1,

36:5 (6th ed. 2012).

**APJI 11.39 REAL PROPERTY GENERAL
RULE—DIRECT COMPENSATORY
DAMAGES [PL]**

(Name of plaintiff) says (name of defendant)’s conduct harmed (his/her/its) land.

The measure of damage is the difference between the reasonable market value of the land immediately before the harm and the reasonable market value immediately after the harm.

You must decide if (name of defendant)’s conduct harmed (name of plaintiff)’s land. If it did, you must then determine the difference, if any, between the reasonable market values of the land immediately before and immediately after the harm.

Notes on Use

This Instruction states the general rule about the measure of direct compensatory damage to real property and is based on the holding in *Poffenbarger v. Merit Energy Co.*, 972 So. 2d 792 (Ala. 2007). The Poffenbargers sued Merit Energy Company for trespass, nuisance, negligence and wanton conduct when Merit’s oil pipeline leaked oil and it entered the Poffenbarger’s land. The court held that the general rule about measure of direct compensatory damage to real property is “the diminution in the value of that property even when the cost to remediate the property exceeds the diminution in value” 972 So. 2d at 801. The rule is flexible, and *Poffenbarger* discusses the rule and its exceptions. See the references for exceptions to the general rule.

References

Poffenbarger v. Merit Energy Co., 972 So. 2d 792 (Ala. 2007).

Tennessee Corp. v. Barnett, 269 Ala. 450, 114 So. 2d 135 (1959). If the property can be adapted for a special purpose and this affects its value, the jury may consider this when assessing damages.

Wert v. Geeslin, 37 Ala. App. 351, 69 So. 2d 718 (1953).

W.T. Smith Lumber Co. v. McKenzie, 256 Ala. 496, 55 So. 2d 919 (1952).

Alabama Power Co. v. Thompson, 250 Ala. 7, 32 So. 2d 795 (1947). The measure of damage to a reversionary interest or estate in land caused by destruction of timber is the diminished value of land caused by destruction of trees and not the value of the timber cut.

Guest v. Guest, 234 Ala. 581, 176 So. 289 (1937).

Southern Ry. Co. v. Slade, 192 Ala. 568, 68 So. 867 (1915). When trees are destroyed, the measure of damage is the diminished value of the premises on which they are grown.

Atlanta & B. Air Line Ry. v. Brown, 158 Ala. 607, 48 So. 73 (1908). Measure of damage to crops on land, if the crops have a value which can be determined without reference to the soil, is limited to the value of the thing destroyed and not the difference in the value of the land before and after such destruction.

Lowery v. Rowland, 104 Ala. 420, 16 So. 88 (1894). When buildings are destroyed by fire, the measure of damage is their value at the time of harm, and when the property has no market value, or the market value is inadequate, the measure of damage is its reasonable value for the uses the owner was putting it or might have put it.

Alabama Great Southern R. Co. v. Russell, 35 Ala. App. 345, 48 So. 2d 239, rev'd on other grounds, 254 Ala. 701, 48 So. 2d 249 (1949). When fences and grass are burned by fire on land, the damages are the value of the items harmed or destroyed, and not the value of the land before and after the injury.

West's Key Number Digest, Damages ⇨107 to 112, 137, 138, 217.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 41.03 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 33:1 to 33:12 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 772 to 775.

William W. Watts, Common Law Remedies in Alabama for Contamination of Land, 29 Cumb. L. Rev. 37 (1999).

Ala. Code § 35-14-1 (1975) (West's Alabama Code) (Statutory penalty for destruction, injury, or removal of trees).

A.L.R. Library

Measure and element of damages for pollution of well or spring, 76 A.L.R.4th 629.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 A.L.R.4th 891.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 148.

Abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 13.

Comment Note.—“Out of pocket” or “benefit of bargain” as proper rule of damages for fraudulent representations inducing contract for the transfer of property, 13 A.L.R.3d 875.

Vendor and purchaser: recovery for loss of profits from contemplated sale or use of land, where vendor fails or refuses to convey, 11 A.L.R.3d 719.

Measure of damages for lessor's breach of contract to lease or to put lessee into possession, 88 A.L.R.2d 1024.

Implied obligation of purchaser or lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas, 76 A.L.R.2d 721.

Measure of vendee's recovery in action for damages for vendor's delay in conveying real property, 74 A.L.R.2d 578.

Recovery for unauthorized geophysical or seismograph exploration or survey, 67 A.L.R.2d 444.

Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 A.L.R.2d 660.

Measure and elements of damages for pollution of stream, 49 A.L.R.2d 253.

Measure of damages for loss of or interference with lateral support, 36 A.L.R.2d 1253.

Liability for obstruction or diversion of subterranean waters in use of land, 29 A.L.R.2d 1354.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 A.L.R.2d 11.

Right of trespasser to credit for expenditures in producing, as against his liability for value of, oil or minerals, 21 A.L.R.2d 380.

Right to recovery, in action for breach of contract to convey lands, expenditures incurred in preparation for performance, 17 A.L.R.2d 1353.

Recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction, 17 A.L.R.2d 936.

Specific performance: compensation or damages awarded purchaser for delay in conveyance of land, 7 A.L.R.2d 1204.

**APJI 11.40 LOSS OF PROFITS—NEW OR
UNESTABLISHED BUSINESS [PL]**

(Name of plaintiff) says (name of defendant)'s (describe the wrongful conduct) caused the loss of expected business profits.

Before you can award damages for loss of expected profits, (name of plaintiff) must prove the loss by evidence that gives you a basis to calculate, with reasonable certainty, the amount of lost profits that (name of plaintiff) claims.

(Name of plaintiff) must also reasonably satisfy you that the loss was caused by (name of defendant)'s wrongful conduct.

Notes on Use

Use this instruction when the plaintiff claims damages for the loss of profits for a new or unestablished business and there is no accurate record of previous business profits upon which to base a finding of probable loss profits.

“Current Alabama law, like the laws of other states, authorizes recovery of lost anticipated profits of an unestablished business if proved with reasonable certainty.” *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317, 327 (Ala. 1987). The theory or theories of the plaintiff's case can be based on fraud or breach of contract, or both fraud and breach of contract, or intentional interference with contract or business relations.

However, the special proof requirements of the reasonable certainty rule does not apply in a breach of contract case when the plaintiff seeks recovery for the loss of general or expectancy damages as opposed to consequential damages (lost profits). *Med Plus Properties v. Colcock Const. Group, Inc.*, 628 So. 2d 370 (Ala. 1993).

References

Johns v. A.T. Stephens Enterprises, Inc., 815 So. 2d 511 (Ala. 2001).

McCluney v. Zap Professional Photography, Inc., 663 So. 2d 922 (Ala. 1995).

Kirkland & Co. of Anniston, P.C. v. A & M Food Service, Inc., 579 So. 2d 1278 (Ala. 1991).

Super Valu Stores, Inc. v. Peterson, 506 So. 2d 317 (Ala. 1987).

Gross v. Lowder Realty Better Homes and Gardens, 494 So. 2d 590 (Ala. 1986), overruled on other grounds, White Sands Group, LLC v. PRS II, LLC, 32 So. 3d 5 (Ala. 2009).

Morgan v. South Cent. Bell Telephone Co., 466 So. 2d 107 (Ala. 1985).

Paris v. Buckner Feed Mill, Inc., 279 Ala. 148, 182 So. 2d 880 (1966).

Morris Concrete, Inc. v. Warrick, 868 So. 2d 429 (Ala. Civ. App. 2003).

Western Union Telegraph Co. v. Tatum, 35 Ala. App. 478, 49 So. 2d 673 (1950).

West's Key Number Digest, Damages ⇨124(3), 147, 159(4), 176.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 41.04 (5th ed. 2012).

Jenelle M. Marsh, Alabama Law of Damages §§ 2:8, 35:11, 36:60 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 442 to 461, 688 to 690, 713, 739, 759, 760, 761, 809.

Michael Stewart, The Evolution of the New Business Rule, 17 Cumb. L. Rev. 239 (1987).

Michael L. Roberts, Profit Recovery for the New or Unestablished Business, 48 Ala. Law 78 (1987).

**APJI 11.41 MITIGATION—DEFINITION AND
BURDEN OF PROOF [PL]**

(Name of defendant) says that (name of plaintiff) did not mitigate the harm.

(Name of plaintiff) must have used the efforts that a reasonably prudent person would have used to minimize the harm caused by (name of defendant)'s wrongful conduct. This is called mitigation of damages. (Name of plaintiff) can recover only the money compensation that would be due if a reasonable effort had been made.

(Name of defendant) must prove to your reasonable satisfaction that (name of plaintiff) did not mitigate (his/her/its) damages.

Notes on Use

Use this instruction when the defendant has pleaded that the plaintiff failed to mitigate damages and when the proof requires the instruction. The duty to mitigate damages is general, and it does not exist in all situations, e.g., when the measure of damages is the difference between before and after values, *Danley v. Murphy*, 658 So. 2d 483 (Ala. Civ. App. 1994).

References

Prudential Ballard Realty Co., Inc. v. Weatherly, 792 So. 2d 1045 (Ala. 2000) (failure to mitigate must be pleaded).

Avco Financial Services, Inc. v. Ramsey, 631 So. 2d 940 (Ala. 1994).

Christiansen v. Hall, 567 So. 2d 1338 (Ala. 1990).

Carnival Cruise Lines, Inc. v. Goodin, 535 So. 2d 98 (Ala. 1988).

Gradco, Inc. v. St. Clair County Bd. of Educ., 477 So. 2d 365, 28 Ed. Law Rep. 687 (Ala. 1985).

Britton v. Doebling, 286 Ala. 498, 242 So. 2d 666 (1970) (the doctrine of mitigation is frequently called avoidable consequences).

Mobile & O.R. Co. v. Red Feather Coal Co., 218 Ala. 582, 119 So. 606 (1928).

Werten v. K. B. Koosa & Co., 169 Ala. 258, 53 So. 98 (1910).

Shelton v. Clements, 834 So. 2d 775 (Ala. Civ. App. 2002) (failure to mitigate damages is an affirmative defense).

Standard Oil Co. v. Lloyd, 26 Ala. App. 306, 159 So. 371 (1935).

Wheelan v. Sessions, 50 F. Supp.2d 1168 (M.D. Ala. 1999).

West's Key Number Digest, Damages ⇨62 to 65, 155, 157(2).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.02 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 2:9, 28:10, 36:12 (6th ed. 2012).

Ala. R. Civ. P. 8(c).

Am. Jur. 2d, Damages §§ 335 to 339.

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Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant, 75 A.L.R.5th 1.

Duty of injured person to submit to nonsurgical medical treatment to minimize tort damages, 62 A.L.R.3d 70.

Duty of injured person to submit to surgery to minimize tort damages, 62 A.L.R.3d 9.

Nature of alternative employment which employee must accept to minimize damages for wrongful discharge, 44 A.L.R.3d 629.

Suicide as compensable under Workmen's Compensation Act, 15 A.L.R.3d 616.

Pleading matter in mitigation of damages in tort action other than libel and slander, 75 A.L.R.2d 473.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 A.L.R.2d 878.

**APJI 11.42 PUNITIVE DAMAGES—
PRINCIPAL'S VICARIOUS
LIABILITY [PL]**

If you find that (name of agent/servant/employee) was responsible for (name of plaintiff)'s harm, and that punitive damages should be awarded for (his/her) wrongful conduct, you can award punitive damages against (name of principal/master/employer) if you are reasonably satisfied by the evidence that:

1. (Name of principal/master/employer) either knew or should have known that (name of agent/servant/employee) was unfit but (name of employer) hired or continued to employ (him/her) with a disregard for the rights or safety of others; or

(Name of principal/master/employer) used (name of agent/servant/employee)'s services without proper instruction and with a disregard for the rights and safety of others; or

2. (Name of principal/agent/employer) approved (name of agent/servant/employee)'s wrongful conduct before it happened; or

3. (Name of principal/master/employer) approved (name of agent/servant/employee)'s wrongful conduct after it happened; or

4. (Name of agent/servant/employee)'s acts were intended to or did benefit (name of principal/master/employer) (AND IF APPROPRIATE: except where the (name of plaintiff) knowingly participated with (name of agent/servant/employee) to commit fraud or other wrongful conduct).

Notes on Use

Use this instruction when the plaintiff seeks punitive damages from a principal because of the acts or omissions of an agent.

This instruction does not apply to a claim for wrongful death. Ala. Code § 6-11-29 (1975) (West's Alabama Code).

The limitations contained in this instruction do not prevent recovery of punitive damages against a retail vendor of alcoholic beverages arising out of the acts of an agent acting within the line and scope of his employment.

APJI 3.08 instructs on ratification.

The elements of each species of fraud, and deceit, are stated in APJI 18.00 to 18.05. Important Fact is defined in APJI 18.08. Reliance is defined in APJI 18.10.

References

Ala. Code § 6-11-27 (1975) (West's Alabama Code).

State Farm Mut. Auto. Ins. Co. v. Nix, 888 So. 2d 489 (Ala. 2004).

Ex parte Liberty Nat. Life Ins. Co., 797 So. 2d 457 (Ala. 2001).

New Plan Realty Trust v. Morgan, 792 So. 2d 351 (Ala. 2000).

Ex parte Henry, 770 So. 2d 76 (Ala. 2000).

CP & B Enterprises, Inc. v. Mellert, 762 So. 2d 356 (Ala. 2000).

USA Petroleum Corp. v. Hines, 770 So. 2d 589 (Ala. 1999).

Alfa Mut. Ins. Co. v. Roush, 723 So. 2d 1250 (Ala. 1998).

Cain v. Mortgage Realty Co., Inc., 723 So. 2d 631 (Ala. 1998).

Big B, Inc. v. Cottingham, 634 So. 2d 999 (Ala. 1993), abrogation recognized, Horton Homes, Inc. v. Brooks, 832 So. 2d 44 (Ala. 2001).

Northwestern Mut. Life Ins. Co. v. Sheridan, 630 So. 2d 384 (Ala. 1993).

Abston v. Kelley Bros. Contractors, Inc., 990 F. Supp. 1392 (S.D. Ala. 1998).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 42.08 (5th ed. 2010).

Am. Jur. 2d, Employment Relationship § 407.

**APJI 11.43 RELEASE—DEFINITION, EFFECT,
AND BURDEN OF PROOF [PL]**

(Name of defendant) says that (name of plaintiff) agreed not to hold (him/her/it) responsible for the things that (name of plaintiff) sues about in this lawsuit. Such an agreement is called a release, and it can be written or oral.

A person releases another from responsibility when (he/she/it) agrees to completely give up a legal claim against that person, or (he/she/it) agrees to completely give up a right (he/she/it) can enforce against that person.

(Name of defendant) must prove that (name of plaintiff) released (him/her/it). If (he/she/it) proves a release, (name of plaintiff) cannot recover.

Notes on Use

Use this instruction when the defendant pleads release as an affirmative defense.

However, if the plaintiff claims that the release was agreed because of fraud, undue influence, or duress, use the fourth paragraph of the instruction instead of the third paragraph. See APJI 10.25 (fraud as a defense); APJI 10.26 (undue influence as a defense); and APJI 10.27 (duress as a defense). These instructions must be modified because the plaintiff, not the defendant, has the burden of proof when plaintiff seeks to avoid a release.

References

Ala. Code § 8-1-23 (1975) (West's Alabama Code) and Ala. Code § 12-21-109 (1975) (West's Alabama Code).

SMM Gulf Coast, LLC v. Dade Capital Corporation, Ms. 1170743, 1170771, 2020 WL 3023051 (Ala. June 5, 2020). When money is paid as an inducement to sign a release, the release cannot be repudiated without first tendering back the money paid.

Turner v. State Farm Mutual Insurance Company, Ms. 1181076, 2020 WL 2781283 *4 (Ala. May 29, 2020). The Court defined repudiation in the context of a consent to settle provision in an insurance contract.

APJI 11.43**ALABAMA PATTERN JURY INSTRUCTIONS**

Newman v. Howard, 239 So. 3d 1147 (Ala. 2017).

Am. Jur. 2d, Release § 1.

**APJI 11.44 PRO TANTO RELEASE—EFFECT
[PL]**

(Name of plaintiff) filed this lawsuit against (name of party released) and (name of defendant at trial). (Name of plaintiff) released (name of party released) for \$_____, and reserved (his/her/its) right to continue the lawsuit against (name of defendant at trial).

If you find for (name of plaintiff), you will decide the total amount of damages, if any, to award (him/her/it) and then subtract the \$_____ paid by (name of party released). The balance is the amount of your verdict that you will write on the verdict form.

Notes on Use

Use this instruction in any case when a pro tanto release has been pleaded, put in evidence, is undisputed, and the defendant elects for the jury to render a net verdict.

The defendant alone may move to admit evidence of a pro tanto settlement. The defendant can put on evidence of the pro tanto settlement and request the jury be instructed on its effect, or the defendant can ask the judge to set off the pro tanto settlement against the verdict. The choice of how and whether to admit evidence of a pro tanto settlement rests squarely with the defendant, and the defendant must be allowed the option of either telling the jury about the settlement at all or choosing a post-judgment setoff done by the trial court.

The committee takes no position on whether it is error to prohibit admission of the settlement document into evidence, assuming its admission is not prohibited by other rules of evidence.

The committee suggests that the defendant inform the trial judge as soon as possible how the defendant will proceed.

References

Refer to the references in APJI 11.43, Release.

Ala. Code § 12-21-109 (1975) (West's Alabama Code).

Har-Mar Collisions, Inc. v. Scottsdale Ins. Co., 212 So. 3d 892 (Ala. 2016).

Morris v. Laster, 821 So. 2d 923 (Ala. 2001). Defendant has the sole option to put on evidence of pro tanto settlement or ask judge to set the settlement off against any verdict against the non-settling defendant.

Pierce v. Orr, 540 So. 2d 1364 (Ala. 1989). A release is construed according to its terms and the parties' intent.

Hardman v. Freeman, 337 So. 2d 325 (Ala. 1976). "The policy in favor of the pro tanto satisfaction for joint tort-feasors is well established in Alabama law upon the theory that the right of action against joint tort-feasors is one and indivisible."

Miller v. Dacovich, 355 So. 2d 1109 (Ala. 1978). Pro tanto settlement must be raised at the first opportunity.

Daugherty v. M-Earth of Alabama, Inc., 519 So. 2d 467 (Ala. 1987). Pro tanto release of agent that preserves the right to pursue claims against the principal does not release principal.

Ex parte Barnett, 978 So. 2d 729 (Ala. 2007). Underinsured motorists benefits paid in settlement to plaintiff are not set-off against verdict against joint tort-feasor.

Alfa Life Ins. Corp. v. Jackson, 906 So. 2d 143 (Ala. 2005). When the principal issued on the theory of respondeat superior for the agent's tortuous conduct, and the plaintiff dismisses the claims against the agent with prejudice without preserving the right to proceed against the principal, the dismissal is an adjudication in favor of the agent and the principal cannot be held vicariously liable.

Ex parte Goldsen, 783 So. 2d 53 (Ala. 2000). Settlement against joint tort-feasor is set-off against verdict even though settling defendant is found not responsible by verdict for plaintiff's uninsured/under-insured carrier.

Ford Motor Co. v. Neese, 572 So. 2d 1255 (Ala. 1990). Reformation of general release to express parties intent that the release was pro tanto.

Wylam Ice Co. v. King, 293 Ala. 359, 304 So. 2d 1 (1974).

Anderson v. Kemp, 279 Ala. 321, 184 So. 2d 832 (1966).

Bell v. Riley Bus Lines, 257 Ala. 120, 57 So. 2d 612 (1952).

Dynasty Housing, Inc. v. McCollum, 832 So. 2d 73 (Ala. Civ. App. 2001). Pro tanto settlement in arbitration is not set off against the arbitration award because the arbitration agreement stated that the award will be “final and binding.”

West’s Key Number Digest, Damages ¶63; Release ¶1, 29, 31.

2 Michael L. Roberts and Gregory S. Cusimano, *Alabama Tort Law* § 36.06 (5th ed. 2010).

Jenelle M. Marsh, *Alabama Law of Damages* §§ 17:9, 37:8 (6th. ed. 2012).

Charles W. Gamble and Robert J. Goodwin, *McElroy’s Alabama Evidence* §§ 188.02, 188.06 (6th ed. 2009).

Ally W. Howell, *Alabama Personal Injury and Torts* §§ 16:11 to 16:13 and 16:29 to 16:34 (2012).

Henry T. Morrisette, *The Future of The General Release After Pierce v. Orr*, 42 Ala. L. Rev. 233 (1990).

Am. Jur. 2d, Release §§ 35, 36, 37, 43, 44, 45, 46.

Alabama Code § 8-1-2 (1975) (West’s Alabama Code).

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Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686.

Insurer’s tort liability for acts of adjuster seeking to obtain settlement or release, 39 A.L.R.3d 739.

Release of one responsible for injury as affecting liability of physician or surgeon for negligent treatment of injury, 39 A.L.R.3d 260.

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 A.L.R.3d 1427.

Validity and construction of contract exempting hospital or doctor from liability for negligence to patient, 6 A.L.R.3d 704.

Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A.L.R.3d 456.

Restitution as prerequisite of setting aside release or compromise of claim under Federal Employers Liability Act, as affected by provision thereof invalidating contract, rule, or device to exempt carrier from liability, 96 A.L.R.2d 655.

Avoidance of release of personal injury claims on ground of fraud or mistake as to extent or nature of injuries, 71 A.L.R.2d 82.

Right of action for fraud, duress, or the like, causing instant plaintiff to release cause of action against third persons, 58 A.L.R.2d 500.

Interest on consideration returned or tendered as condition of setting aside release or compromise, 53 A.L.R.2d 749.

Right to jury trial on issue of validity of release, 43 A.L.R.2d 786.

Laches as precluding cancellation of or other relief against release for personal injuries, 34 A.L.R.2d 1314.

Discretion of court to vacate its approval of settlement or release in respect of personal injury to minor, 8 A.L.R.2d 460.

APJI 11.45 SPECIFIC RELEASE [PL]

(Name of defendant) says that before (name of plaintiff) filed this lawsuit, (he/she/it) signed a written release that released (his/her/its) claim against (name of defendant).

(Name of defendant) must prove to your reasonable satisfaction that when (name of plaintiff) signed the release (he/she/it) intended to release claims against (him/her/it).

If (name of defendant) proves that (name of plaintiff) intended to release (his/her/its) claims against (name of defendant), (name of plaintiff) cannot recover.

Notes on Use

Use this instruction when an unnamed third party referred to in a release as “any and all parties or similar language or by words of like import, who have paid no part of the consideration [for the release] and who are not the agents, principals, heirs, assigns of, or who do not otherwise occupy a privity relationship with the named payors” asserts the release as a defense. *Pierce v. Orr*, 540 So. 2d 1364, 1367 (Ala. 1989). “The shift in the burden of proof does not preclude unnamed third parties from timely interposing a defense to the extent of claiming credit for any amount paid by named parties to the release.” *Pierce v. Orr*, 540 So. 2d 1364, 1367 (Ala. 1989).

APJI 10.49 instructs a jury about contract interpretation and determining the party’s intent.

See APJI 11.43, Release—Definition, Effect, and Burden of Proof, and APJI 11.44, Pro Tanto Release—Effect.

References

Ala. Code § 12-21-109 (1975) (West’s Alabama Code). “All receipts, releases and discharges in writing, whether of a debt of record, a contract under seal or otherwise, and all judgments entered pursuant to pro tanto settlements, must have effect according to their terms and the intentions of the parties thereto”.

Whitman v. Walker County Bd. of Educ., 591 So. 2d 481, 71 Ed. Law Rep. 1292 (Ala. 1991).

Green v. Wedowee Hosp., 584 So. 2d 1309 (Ala. 1991).

Ford Motor Co. v. Neese, 572 So. 2d 1255 (Ala. 1990).

Pierce v. Orr, 540 So. 2d 1364 (Ala. 1989).

Wittner v. Kemp, 529 So. 2d 961 (Ala. 1988). Release, which released corporation and two named individuals and successors and assigns of corporation and named individuals, was a specific, rather than general, release and did not release individual who was not named in release.

American Pioneer Life Ins. Co. v. Sandlin, 470 So. 2d 657 (Ala. 1985). When the language of the document is not in terms of a general release, the reservation of the right to sue other parties is not essential.

Wylam Ice Co. v. King, 293 Ala. 359, 304 So. 2d 1 (1974). A third party has the right to plead, when timely interposed, the amount of the settlement as shown in a release, even in those cases where the express language in the release reserved the injured party's right to proceed against other joint tortfeasors.

Alabama Educ. Assoc. v. Black, 752 So. 2d 514 (Ala. Civ. App. 1999).

**APJI 11.46 PAYMENT—RECEIPT—BURDEN
OF PROOF [PL]**

(Name of defendant) says (the money) (part of the money) sued for by (name of plaintiff) has been paid.

Payment is an affirmative defense, and (name of defendant) must prove that (he/she/it) paid (name of plaintiff) (all) (part) of the money sued for. To support this, (name of defendant) put a receipt for the payment into evidence. (Name of plaintiff) has put on evidence to (deny) (explain) the receipt. This creates an issue for you to decide. You must consider all the evidence and decide if (name of defendant) proved that (he/she/it) paid (all) (part) of the money (name of plaintiff) sues for.

Notes on Use

Use this instruction when the defendant offers a receipt in defense of the claim and the plaintiff contests the validity of the receipt.

References

Ala. Code § 12-21-110 (1975) (West's Alabama Code), "Receipts for money are always prime facie evidence of payment and may be denied or explained by parol evidence."

Homewood Dairy Products Co. v. Robinson, 254 Ala. 197, 48 So. 2d 28 (1950).

Ex parte Baggett, 211 Ala. 610, 101 So. 104 (1924).

Stegall v. Wright, 143 Ala. 204, 38 So. 844 (1905).

Scruggs v. Bibb, 33 Ala. 481, 1859 WL 593 (1859).

Saunders v. Hendrix, 5 Ala. 224, 1843 WL 114 (1843).

Hylton v. Meztista, 845 So. 2d 792 (Ala. Civ. App. 2000), rev'd on other grounds, Ex parte Meztista, 845 So. 2d 795, 51 U.C.C. Rep. Serv. 2d 461 (Ala. 2001).

West's Key Number Digest, Release ⌘55; Accord and Satisfaction ⌘25(1), 26(1).

APJI 11.46**ALABAMA PATTERN JURY INSTRUCTIONS**

II Charles W. Gamble and Robert J. Goodwin, McElroy's Alabama Evidence §§ 226.03, 274.02 (6th ed. 2009).

Ala. R. Civ. P. 8(c).

Ala. Code § 12-21-109 (1975) (West's Alabama Code). All receipts must have effect according to their terms and the intentions of the parties.

Ala. Code §§ 8-1-20 to 8-1-23 (1975) (West's Alabama Code).

**APJI 11.47 RELEASE—AVOIDANCE
—FRAUD [PL]**

If you find there is a release, (name of plaintiff) says (he/she/it) is not bound by it because (he/she/it) only agreed to the release because of (name of defendant)'s fraud. (Name of plaintiff) must prove (name of defendant)'s fraud to avoid the release.

Use the instructions in APJI 18.01 to 18.05, to instruct the jury on the elements of the particular species of fraud. In addition to the elements of fraud, the plaintiff must also prove that she returned the consideration or offered to return the consideration, unless return is excused.

If you find that (name of defendant) committed fraud, (name of plaintiff) must also prove that (he/she/it) returned or offered to return (describe the consideration) to (name of defendant). (Name of plaintiff) must have done this within a reasonable time after (he/she/it) found out about the fraud.

However, (name of plaintiff) does not have to return (describe the consideration) if:

- a) (Name of defendant) did not give any consideration for the release; or
- b) The consideration had no value; or
- c) An offer to return the consideration would have been pointless; or
- d) It would have been impossible or impractical to return the consideration; or
- e) (Name of defendant) was aware that (name of plaintiff) was obligated to return the consideration, but (name of defendant) chose not to ask for its return.

Notes on Use

Use this instruction when fraud is claimed to avoid the prima

facie legal effect of a release. The instruction combines instructions APJI 11.34 and 11.35 (2d ed. 1993).

The elements of each species of fraud and deceit are stated in APJI 18.00 to 18.05. Important Fact is defined in APJI 18.08. Reliance is defined in APJI 18.10.

Consideration is defined in APJI 10.04.

References

McGinnis v. Continental Ins. Co., 628 So. 2d 470 (Ala. 1993).

Hall v. Gaines, 613 So. 2d 370 (Ala. 1993).

Taylor v. Dorrough, 547 So. 2d 536 (Ala. 1989).

Jehle-Slauson Const. Co. v. Hood-Rich Architects and Consulting Engineers, 435 So. 2d 716 (Ala. 1983).

Barbour v. Poncelor, 203 Ala. 386, 83 So. 130 (1919), receded from in, Pierce v. Orr, 540 So. 2d 1364 (Ala. 1989).

Birmingham Ry., Light & Power Co. v. Jordan, 170 Ala. 530, 54 So. 280 (1911).

Western Ry. of Alabama v. Arnett, 137 Ala. 414, 34 So. 997 (1903).

Anderson v. Amberson, 905 So. 2d 811 (Ala. Civ. App. 2004).

Weaver v. Dan Jones Ford, Inc., 679 So. 2d 1106, 1996-1 Trade Cas. (CCH) ¶ 71352 (Ala. Civ. App. 1996).

Kashuba v. Jim Limbaugh Toyota, Inc., 669 So. 2d 987 (Ala. Civ. App. 1995).

Jeter v. Orkin Exterminating Co., 84 F. Supp.2d 1334 (M.D. Ala. 2000).

West's Key Number Digest, Release ☞17, 57(2), 58(6).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 36.06 (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages §§ 17:9, 37:8 (6th ed. 2012).

Am. Jur. 2d, Release §§ 23 to 26.

**APJI 11.48 RELEASE—AVOIDANCE
—DURESS [PL]**

If you find there is a release, (name of plaintiff) says (he/she/it) is not bound by it because (he/she/it) agreed to it under duress.

To prove this, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That ((name of defendant))/(name of defendant's representative, agent, servant, employee)) (describe the threat or other wrongful conduct) to pressure (name of plaintiff) to agree to the release;

2. That as a result of the conduct, (name of plaintiff) reasonably believed (he/she/it) had no reasonable alternative but to agree to the release; and

3. That (name of plaintiff) returned or offered to return (describe the consideration). (Name of plaintiff) must have done this within a reasonable time after (he/she/it) was no longer under duress.

However, (name of plaintiff) does not have to return (describe the consideration) if:

- a. (Name of defendant) did not give any consideration for the release; or
- b. The consideration had no value; or
- c. An offer to return the consideration would have been pointless; or
- d. It would have been impossible or impractical to return the consideration; or
- e. (Name of defendant) was aware that (name of plaintiff) was obligated to return the consideration, but (name of defendant) chose not to ask for its

return.

Notes on Use

Use this instruction when the plaintiff seeks to avoid a written release on the ground of duress.

The instruction is patterned on APJI 10.27 and is not applicable to the defense of undue influence or economic duress. APJI 10.28 instructs on economic duress.

References

United Companies Financial Corp. v. Wyers, 518 So. 2d 700 (Ala. 1987).

Grimes v. Liberty Nat. Life Ins. Co., 514 So. 2d 965 (Ala. 1987).

Day v. Ray E. Friedman & Co., 395 So. 2d 54, 29 U.C.C. Rep. Serv. 925 (Ala. 1981).

Gilbert v. Wilson, 237 Ala. 645, 188 So. 260 (1939).

Kelly v. Louisville & N. R. Co., 154 Ala. 573, 45 So. 906 (1908).

Royal v. Goss, 154 Ala. 117, 45 So. 231 (1907).

Hartford Fire Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651 (1896).

BSI Rentals, Inc. v. Wendt, 893 So. 2d 1184 (Ala. Civ. App. 2004).

Head v. Gadsden Civil Service Bd., 389 So. 2d 516 (Ala. Civ. App. 1980), writ denied, 389 So. 2d 520 (Ala. 1980).

West's Key Number Digest, Release ⌚18, 57(2), 58(6); Evidence ⌚435; Payment ⌚87(1) to 87(5); Pleading ⌚8(16); Compromise and Settlement ⌚8(3); Contracts ⌚95(3), 95(4), 95(5); Trial ⌚252(17).

Arthur L. Corbin, Corbin on Contracts § 6 (1952).

Ala. R. Civ. P. 8(c) (duress is an affirmative defense).

Am. Jur. 2d, Release § 26.

**APJI 11.49 RELEASE—AVOIDANCE—FAILURE
OF CONSIDERATION [PL]**

(Name of plaintiff) says the consideration for the release failed because (describe the consideration and why plaintiff says it failed, e.g., the defendant did not deliver the money), and (he/she/it) is not bound by the release.

If (name of plaintiff) proves to your reasonable satisfaction that the consideration for the release failed, the release does not prevent (him/her/it) from recovering damages.

Notes on Use

Use this instruction when the plaintiff seeks to avoid the prima facie effect of the release because the consideration failed.

Consideration is defined in APJI 10.04.

References

Self v. Slaughter, 16 So. 3d 781 (Ala. 2008).

Grimes v. Liberty Nat. Life Ins. Co., 514 So. 2d 965 (Ala. 1987). Consideration is not required to be adequate in the sense of equality of value.

Melvin v. Franklin Life Ins. Co., 274 Ala. 671, 151 So. 2d 238 (1963).

Mitchell v. Cobb, 270 Ala. 346, 118 So. 2d 918 (1960).

West's Key Number Digest, Release ☞ 11.1 to 14.

Ala. R. Civ. P. 8(c) (failure of consideration is an affirmative defense).

Am. Jur. 2d, Release §§ 11 to 13.

**APJI 11.50 COMBINED DAMAGES—
PERSONAL INJURY AND
WRONGFUL DEATH [PL]**

(Name of plaintiff) asks for two separate and different types of damages in this case. (He/She) says that (name of defendant)(s) wrongful conduct caused (name of decedent) harm, and (he/she) asks for compensatory damages for the harm. In addition, (he/she) says that (name of defendant)(s) wrongful conduct caused (name of decedent)'s death, and (he/she) asks for punitive damages for wrongful death.

(Name of plaintiff) asks for compensatory damages from the time (name of decedent) was harmed to the time of (his/her) death. If you decide that (name of defendant)(s) conduct was (negligent, wanton, a breach of contract) and it caused (name of decedent) harm, you should award compensatory damages for this period of time. You cannot award compensatory damages beyond (name of decedent)'s death.

(Name of plaintiff) also asks for punitive damages for (name of decedent)'s wrongful death. If you decide that (name of defendant)(s) conduct was (negligent, wanton), and it caused (name of decedent)'s death, you must then decide if you should award punitive damages for wrongful death.

Notes on Use

Use this introductory instruction when the plaintiff claims that the defendant(s) conduct caused the decedent's personal injuries and the decedent's death. It will be a rare cause in a survival claim when the plaintiff will claim both negligent and wanton conduct; however, the law allows it and both are included for that reason.

This instruction should follow APJI 11.09 and APJI 11.28.

References

Ala. Code § 6-5-462 (1975) (West's Alabama Code).

Malcolm v. King, 686 So. 2d 231 (Ala. 1996).

Hogland v. Celotex Corp., 620 So. 2d 621 (Ala. 1993).

King v. National Spa and Pool Institute, Inc., 607 So. 2d 1241 (Ala. 1992).

Benefield v. Aquaslide N Dive Corp., 406 So. 2d 873 (Ala. 1981).

Huckaby v. East Alabama Medical Center, 830 F. Supp. 1399, 42 Soc. Sec. Rep. Serv. 320 (M.D. Ala. 1993).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 33.06, 33.07 (5th ed. 2010).

Ally W. Howell, Alabama Personal Injury and Torts §§ 9:1 to 9:7 (2012).

Jenelle M. Marsh, Alabama Law of Damages § 11:34 (6th ed. 2012).

Chapter 12

Detinue [PL]

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- APJI 12.00 General Consideration [PL]
- APJI 12.01 Plea of General Issue—Introduction [PL]
- APJI 12.02 Assessment of Alternate Value on Verdict for
Plaintiff—Suit for One Article in Possession of
Defendant [PL]
- APJI 12.03 Damages—Value of Use or Hire During Wrongful
Detention of Article in Possession of the Defendant
if Plaintiff Is Entitled to Recover [PL]
- APJI 12.04 Assessment of Alternate Value—On Verdict for
Plaintiff in Suit for More Than One Article in
Possession of Defendant [PL]
- APJI 12.05 Damages—If Defendant Entitled to Recover
Article(s) in Possession of Plaintiff [PL]
- APJI 12.06 Suit by Vendor or Mortgagee or Other Holder of a
Security Interest [PL]

APJI 12.00 GENERAL CONSIDERATION [PL]

The Alabama statutes combine the qualities of detinue and replevin as those remedies were understood at the common law. “But one form and method of procedure are prescribed for any recovery of a chattel whether the grievance be the mere wrongful detention resulting from a possession originating in contract or an unlawful taking and detention; and to this procedure is adapted the machinery of the action of replevin for seizing the property, at the institution of the suit, and its custody, under bonds, to abide judgment upon the rights of the parties. Detinue and replevin, as they are distinguished from each other, are practically superseded by this statutory substitute, designed to answer the aims and ends of both. So combined, the beneficial incidents of the old remedies will be held to attach to the new system.” *Rich v. Lowenthal*, 99 Ala. 487, 490–91, 13 So. 220, 221 (1893).

Statutory provisions for replevin of goods in advance of trial by posting bond similar to Ala. Code § 6-6-250 (1975) (West’s Alabama Code), have been declared to be unconstitutional by the Supreme Court of the United States. *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972), reh’g denied, 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 177. The U.S. Supreme Court had two cases before it attacking the Statutes of Florida and Pennsylvania. The Syllabus of that opinion is as follows:

“Appellants, most of whom were purchasers of household goods under conditional sales contracts, challenged the constitutionality of prejudgment replevin provisions of Florida law (in No. 70-5039) and Pennsylvania law (in No. 70-5138). These provisions permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of ex parte application to a court clerk, upon the posting of a bond for double the value of the property to be seized. The sheriff is then required to execute the writ by seizing the property. Under the Florida statute, the officer seizing the property must keep it for three days. During that period the defendant may reclaim possession by posting his own security bond for double the property’s value, in default of which the property is transferred to the applicant for the writ, pending a final judgment in the underlying repossession action. In Pennsylvania the applicant need not initiate a repossession action or allege (as Florida requires) legal entitlement to the property, it being sufficient that he file an ‘affi-

davit of the value of the property'; and to secure a post-seizure hearing the party losing the property through replevin must himself initiate a suit to recover the property. He may also post his own counterbond within three days of the seizure to regain possession. Included in the printed-form sales contracts that appellants signed were provisions for the sellers' repossession of the merchandise on the buyers' default. Three-Judge District Courts in both cases upheld the constitutionality of the challenged replevin provisions.

"The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor."

The repugnant and unconstitutional part of the statutes is they allow property to be taken without procedural due process. The court held procedural due process includes the right to notice and opportunity to be heard at a "meaningful time and in a meaningful manner."

The intent of Rules 64, 64A, and 64B of the Alabama Rules of Civil Procedure is to meet procedural due process objections to the Alabama statute.

References

Am. Jur. 2d, Replevin §§ 160 to 162.

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Excessiveness or inadequacy of attorney's fees in matters involving commercial and general business activities, 23 A.L.R.5th 241.

Amount of attorneys' fees in matters involving domestic relations, 59 A.L.R.3d 152.

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates, 58 A.L.R.3d 317.

Amount of attorneys' fees in tort actions, 57 A.L.R.3d 584.

Amount of attorneys' compensation in matters involving guardianship and trusts, 57 A.L.R.3d 550.

Comment Note.—Amount of attorneys' compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 A.L.R.3d 1233.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 A.L.R.3d 768.

Recovery of attorney fees as damages by successful litigant in replevin or detinue action, 60 A.L.R.2d 945.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative, 42 A.L.R.2d 418.

Credit for upkeep or other expense in computing damages for use or detention of property, 7 A.L.R.2d 933.

Right of action for conversion as affected by assertion of rights or pursuit of remedies founded on continued ownership of the property, 3 A.L.R.2d 218.

Sufficiency of proof of possession of defendant at time of commencement of action, 2 A.L.R.2d 1043.

Calculations of attorneys' fees under Federal Tort Claims Act—28 USCS § 2678, 86 A.L.R. Fed. 866.

**APJI 12.01 PLEA OF GENERAL ISSUE—
INTRODUCTION [PL]**

Plaintiff (name of plaintiff) sues to get (describe the article) or (its/their) worth plus the money that (he/she) could have made from (its/their) use or rental.

Defendant (name of defendant) says that (name of plaintiff) should not get (describe the article) or any money.

For (name of plaintiff) to recover damages or this claim (he/she) must reasonably satisfy you that (he/she) had the right to (it/them) when (he/she) filed the lawsuit. If (name of plaintiff) proves this you may give (name of plaintiff) the (describe the article) or the dollar value of the (describe the article) if (name of plaintiff) proves the worth of the (describe the article(s)). (Name of plaintiff) must also prove how much money (he/she) could have made from (its/their) use or rental while (name of defendant) kept (it/them).

Notes on Use

Use this instruction when the defendant(s) interpose(s) the general denial. If damage for detention is proven or is waived, omit the part about wrongful detention.

See APJI 12.02 for fixing alternate value in a suit when only one article is in possession of the defendant.

See APJI 12.03 for fixing damages for detention when the article is in possession of the defendant(s) and the verdict is for the plaintiff.

See APJI 12.04 for fixing alternate value for more than one article in the defendant's possession.

See APJI 12.05 for instruction on fixing the alternate value and damages in a suit for article(s) in possession of plaintiff on verdict for defendant(s).

See APJI 12.06 for instruction in a claim by mortgagee or vendor and the defendant suggests that the jury ascertain the balance due.

References

Walker v. Young, 39 Ala. App. 604, 105 So. 2d 875 (1958). Measure of damages in detention is the specific property, or its alternate value, together with the value of the use or hire during the wrongful detention.

Webb v. Webb, 263 Ala. 607, 83 So. 2d 325 (1955). "The gist of an action of detinue is the detention of a chattel at the time of the commencement of the suit, that is, when the complaint is filed in the office of the clerk."

Ballard v. First Nat. Bank of Birmingham, 261 Ala. 594, 75 So. 2d 484 (1954). Plea of general issue admits possession at the commencement of action.

Gwin v. Emerald Co., 201 Ala. 384, 78 So. 758 (1918).

The burden of proof is on plaintiff to reasonably satisfy jury that at time of commencement of action:

1. Plaintiff had a general or special property in the article. Ryall v. Pearson Bros., 148 Ala. 668, 41 So. 673 (1906).

2. Right to immediate possession. Brannon v. Cole, 40 Ala. App. 222, 110 So. 2d 645 (1959).

3. That defendant had possession at time of filing suit. Brannon v. Cole, 40 Ala. App. 222, 110 So. 2d 645 (1959).

4. Alternate Value. Mackey v. Hall Auto Co., 27 Ala. App. 557, 176 So. 318 (1937); Graham v. Fincher, 21 Ala. App. 276, 107 So. 327 (1926).

5. Damages for detention. Mackey v. Hall Auto Co., 27 Ala. App. 557, 176 So. 318 (1937); Ala. Code § 6-6-256 (1975) (West's Alabama Code).

Ala. R. Civ. P. 38.

Am. Jur. 2d, Replevin §§ 160 to 162.

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Conversion as precluded by resort to replevin, 3 A.L.R.2d 230.

Sufficiency of proof in replevin of defendant's possession at time of commencement of action, 2 A.L.R.2d 1043.

**APJI 12.02 ASSESSMENT OF ALTERNATE
VALUE ON VERDICT FOR
PLAINTIFF—SUIT FOR ONE
ARTICLE IN POSSESSION OF
DEFENDANT [PL]**

First, you must decide if plaintiff (name of plaintiff) has reasonably satisfied you that (he/she) had the right to get (describe the article). If (name of plaintiff) proves this, you should set the dollar value of the (describe the article) in case (name of plaintiff) is not able to get the (describe the article) back.

It is (name of plaintiff)'s responsibility to prove to you how much the (describe the article) would have been worth on a given date. That date can be any date between the date (name of defendant) wrongfully took the (describe the article) and the date of your verdict.

Notes on Use

Use this instruction in a case when only one article is sued for and defendant has possession (see references below).

This instruction should be followed by APJI 12.03 Damages for Wrongful Detention.

Where more than one article is involved, do not use this instruction, use APJI 12.04.

References

There are no decisions by our appellate courts fixing any definite time at which alternate value may be fixed.

Ala. Code § 6-6-256 (1975) (West's Alabama Code), provides that "Upon a trial the jury must, if they find for the plaintiff, assess the value of each article, if practicable, and also assess damages for its detention; if they find for the defendant, they must in like manner assess the value, and, if in the possession of the plaintiff assess damages for its detention. Judgment against either party must be for the property sued for, or its alternate value, with damages for its detention to the time of trial".

First Nat. Bank of Opelika v. La Fayette Farm Machinery Co., 269 Ala. 231, 112 So. 2d 478 (1959). If the successful party is in possession of the property, the error of not fixing alternate value is not fatal error.

Beavers v. Harris, 265 Ala. 548, 93 So. 2d 161 (1956). The general rule is that there must be proof of alternate value of the property and judgment accordingly; otherwise the judgment will be reversed. An exception to this rule is recognized if no prejudice appears by failure to assess the alternate value.

Bolling v. Coffin, 262 Ala. 459, 79 So. 2d 808 (1955).

Baldwin v. Troy Finance Corporation, 245 Ala. 384, 17 So. 2d 417 (1944). Since the law attempts to make the plaintiff whole, the date at which the value of the property should be assessed is to be determined by the facts of the particular case in order to accomplish justice between the parties.

Mackey v. Hall Auto Co., 27 Ala. App. 557, 176 So. 318 (1937). The burden of proving alternate value is upon the plaintiff.

Graham v. Fincher, 21 Ala. App. 276, 107 So. 327 (1926). Where plaintiff fails to prove alternate value, it was reversible error to refuse the general charge for the defendant.

Bank of Andalusia v. Freeman, 200 Ala. 13, 75 So. 325 (1917); Hall v. Chapman's Adm'rs, 35 Ala. 553, 1860 WL 461 (1860). Where the possession is unlawful no demand is necessary since from the beginning the taking is a wrongful detention. Therefore, the jury may assess the value of the property as of any time between the commencement of the wrongful detention and the date of trial.

Wortham v. Gurley, 75 Ala. 356, 1883 WL 919 (1883). The jury may assess the value of the property as of any time between the commencement of the wrongful detention and the trial.

Hall v. Chapman's Adm'rs, 35 Ala. 553, 1860 WL 461 (1860). When a demand is necessary to change a lawful possession into a wrongful detention (as to terminate a bailment) no damages can be recovered, except from the service of the writ, unless a demand has been made. But, where the possession is unlawful a demand is unnecessary and the plaintiff is entitled to recover damages for the wrongful detention.

West's Key Number Digest, Detinue ☞19, 25.

Am. Jur. 2d, Replevin §§ 160 to 170.

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Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property, 97 A.L.R.2d 896.

Revocation of license to cut and remove timber as affecting rights in respect of timber cut but not removed, 26 A.L.R.2d 1194.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 A.L.R.2d 1140.

**APJI 12.03 DAMAGES—VALUE OF USE OR
HIRE DURING WRONGFUL
DETENTION OF ARTICLE IN
POSSESSION OF THE DEFENDANT
IF PLAINTIFF IS ENTITLED TO
RECOVER [PL]**

Plaintiff (name of plaintiff) also claims the money (he/she) could have made from the use or rental of (describe the article).

If you are reasonably satisfied that (name of plaintiff) should get the (describe the article) back, you may also award (him/her) the money (he/she) could have made from (its/their) use or rental.

It is (name of plaintiff)'s responsibility to prove to you how much money (he/she) could have made from (its/their) use or rental while (name of defendant) kept (it/them).

Notes on Use

Use this instruction in any case when the defendant has possession of the property, and there is evidence of the value of its use or hire during the wrongful detention.

This instruction is to follow APJI 12.02—Assessment of Alternate Value.

See APJI 12.05 on value of the use or hire when the plaintiff is in possession of the property and the plaintiff is not entitled to recover.

Burden of proof is on plaintiff. See references under APJI 12.01.

References

Ala. Code § 6-6-256 (1975) (West's Alabama Code).

Balls v. Crump, 256 Ala. 512, 56 So. 2d 108 (1952). Damages may be assessed even though not claimed in the complaint if there is evidence to support an award thereof.

Kinney v. Glenn, 240 Ala. 202, 198 So. 256 (1940). Loss caused by the depreciation in value of property which has a fluctuating market value, though not physically perishable, is a proper element of detention damages.

Louisville & N.R. Co. v. James, 204 Ala. 604, 86 So. 906 (1920). Ordinarily, the measure of recovery in detinue is the specific property or its alternate value, together with the value of the use or hire during wrongful detention, without interest or damages for deterioration in value from ordinary wear and tear.

Southern Ry. Co. v. Coleman, 153 Ala. 266, 44 So. 837 (1907). However, when the detained property is such that its rental value cannot be estimated, interest on its value for the period is considered a fair method of measuring it.

Pruitt v. Gunn, 151 Ala. 651, 44 So. 569 (1907).

Merchants' Nat. Bank v. Bales, 148 Ala. 279, 41 So. 516 (1906). Loss caused by the depreciation in value of perishable property is a proper element of damages.

Watson v. Kirby, 112 Ala. 436, 20 So. 624 (1896).

White v. Sheffield & T. St. Ry. Co., 90 Ala. 253, 7 So. 910 (1890).

Wortham v. Gurley, 75 Ala. 356, 1883 WL 919 (1883). Deterioration in value of the property wrongfully detained occasioned by the wrongdoer through neglect, abuse, or nonuse, is an element of damages recoverable in detinue in addition to the value of the use of the property.

Freer v. Cowles, 44 Ala. 314, 1870 WL 653 (1870) (holding that the deterioration of the property from use, in addition to the annual rent or hire, may be considered by the jury in determining damages for detention).

Fralick v. Presley, 29 Ala. 457, 1856 WL 412 (1856). Interest on the value of the use or hire is not an element of damages and should not be allowed.

West's Key Number Digest, Detinue ☞19.

Am. Jur. 2d, Replevin § 170.

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Maintainability of replevin or similar possessory action where

APJI 12.03**ALABAMA PATTERN JURY INSTRUCTIONS**

defendant, at time action is brought, is no longer in possession of property, 97 A.L.R.2d 896.

Recovery of damages in replevin for usable value of property detained, by successful party having only security interest as conditional vendor, chattel, mortgagee, or the like, 33 A.L.R.2d 774.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 A.L.R.2d 1140.

Sufficiency of proof in replevin of defendant's possession at time of commencement of action, 2 A.L.R.2d 1043.

**APJI 12.04 ASSESSMENT OF ALTERNATE
VALUE—ON VERDICT FOR
PLAINTIFF IN SUIT FOR MORE
THAN ONE ARTICLE IN
POSSESSION OF DEFENDANT [PL]**

Plaintiff (name of plaintiff) says (he/she) is entitled to get (describe the article) back from the defendant (name of defendant).

To recover damages or this claim (name of plaintiff) must reasonably satisfy you:

Which, if any, of the articles (he/she) can get back; and

The dollar value of each article (he/she) can get back.

The plaintiff must prove to you the value of each article on a given date. That date can be any date between the date the defendant wrongfully took the article and the date of your verdict.

Notes on Use

Use this instruction in a case where more than one article is sued for and the defendant has possession. See APJI 12.02 when the case is for only one article.

References

See references to APJI 12.02.

Ala. Code § 6-6-256 (1975) (West's Alabama Code). Where more than one article is described in the complaint jury must assess the alternate value of each article if practicable.

West's Key Number Digest, Detinue ☞19.

Am. Jur. 2d, Replevin §§ 160 to 170.

A.L.R. Library

Availability of replevin or similar possessory action to one not

APJI 12.04**ALABAMA PATTERN JURY INSTRUCTIONS**

claiming as heir, legatee, or creditor of decedent's estate, against personal representative, 42 A.L.R.2d 418.

**APJI 12.05 DAMAGES—IF DEFENDANT
ENTITLED TO RECOVER
ARTICLE(S) IN POSSESSION OF
PLAINTIFF [PL]**

If plaintiff (name of plaintiff) has not reasonably satisfied you that (he/she) had the right to (describe the article) when (he/she) filed the lawsuit, your verdict should be for defendant (name of defendant).

If your verdict is for (name of defendant), you may give (name of defendant) the (describe the article) or the dollar value of the (describe the article) if (name of defendant) proves the dollar value of the (describe the article) on a given date. That date can be any date between the date (name of plaintiff) wrongfully took the (describe the article) and the date of your verdict.

If the defendant reasonably satisfies you that (he/she) should have the (describe the article) you may also award (name of defendant) the money (he/she) could have made from (its/their) use or rental while (name of plaintiff) wrongfully kept (it/them).

Notes on Use

Use this instruction when the plaintiff is in possession of the property and should follow APJI 12.02 if appropriate.

References

Ala. Code § 6-6-256 (1975) (West's Alabama Code).

International Harvester Co. of America v. Pittman, 226 Ala. 355, 147 So. 144 (1933).

Am. Jur. 2d, Replevin § 170.

A.L.R. Library

Sufficiency of proof in replevin of defendant's possession at time of commencement of action, 2 A.L.R.2d 1043.

**APJI 12.06 SUIT BY VENDOR OR
MORTGAGEE OR OTHER HOLDER
OF A SECURITY INTEREST [PL]**

Plaintiff (name of plaintiff) claims it has the right to (describe the article) based on a (contract, mortgage, security agreement, etc.). If (name of plaintiff) reasonably satisfies you that defendant (name of defendant) violated the (contract, etc.) and that violation of the (contract, etc.) gives (name of plaintiff) the right to get (describe the article), your verdict should be for the (name of plaintiff).

(Name of defendant) has suggested that the jury determine the amount of the balance due and unpaid under the (contract, etc.) introduced in evidence. You will therefore also determine, as of the date of your verdict, the balance due (name of plaintiff) under the (contract, etc.) according to the evidence and state the amount in your verdict.

(Name of defendant) says that (he/she) has not violated the (contract, etc.) and that (name of plaintiff) should not get (describe the article).

If (name of plaintiff) proves that (he/she) has the right to get the (describe the article) you may give (name of plaintiff) the (describe the article) or the dollar value of the (describe the article) if (name of plaintiff) proves the worth of the (describe the article).

You may also award money for the use or rental of (describe the article) if (name of plaintiff) proves how much money (he/she) would have made from (its/their) use or rental from the time (name of plaintiff) had the right to get (it/them) and the date of your verdict.

Notes on Use

Use this instruction in any case when a vendor or mortgagee or other holder of a security interest is involved.

If the plaintiff is in possession of property the alternate value

and damages for detention must be ascertained and fixed. Use an appropriate instruction on alternate value and damages for detention when the evidence shows a possible verdict for defendant.

If the defendant does not suggest that the jury ascertain the balance due as permitted by Ala. Code § 6-5-259 (1975) (West's Alabama Code), the first paragraph in addition to appropriate instructions on alternate value and damages for detention (APJI 12.02, 12.03, 12.04) are necessary and the second paragraph above will not be appropriate.

If the defendant(s) requires the jury to ascertain the balance due under Ala. Code § 6-6-259 (1975) (West's Alabama Code), the second paragraph must be used.

References

Ala. Code § 6-6-259 (1975) (West's Alabama Code).

Roberts v. Davis, 230 Ala. 272, 160 So. 718 (1935). Burden of proof is upon plaintiff to show execution of the mortgage under which he claims title and right to possession when defendant pleads the general issue.

Davis v. Reid Lumber Co., 204 Ala. 517, 86 So. 379 (1920). Defendant may not recover a judgment against plaintiff for any excess he may prove.

L. Grunewald Co. v. Copeland, 131 Ala. 345, 30 So. 878 (1901). Defendant may rely on Statute of Limitation to defend any title he may have acquired by holding for the period which bars adverse claims.

Richardson v. First Nat. Bank of Columbus, Ga., 46 Ala. App. 366, 242 So. 2d 676 (Civ. App. 1970), writ denied, 286 Ala. 737, 242 So. 2d 681 (1970). Prima facie case established by admission of instrument into evidence.

Brannon v. Cole, 40 Ala. App. 222, 110 So. 2d 645 (1959).

Hinton v. Barton, 32 Ala. App. 563, 28 So. 2d 213 (1946). Amount of debt ascertained as of date of trial.

Ashley v. Hill, 21 Ala. App. 603, 110 So. 597 (1926). Attorneys' fees provided for in instrument may be proven as part of the amount due.

Ala. R. Civ. P. 18(a).

Am. Jur. 2d, Replevin § 161.

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Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 A.L.R.3d 1233.

CHAPTER 13 [RESERVED]

Chapter 14

Eminent Domain [PL]

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- APJI 14.00 Introduction [PL]
- APJI 14.01 Just Compensation—Defined [PL]
- APJI 14.02 Valuation Date [PL]
- APJI 14.03 Fair Market Value—Defined [PL]
- APJI 14.04 Highest and Best Use [PL]
- APJI 14.05 Prohibited Use—Zoning Ordinance, Etc. [PL]
- APJI 14.06 Prohibited Use—Change in Zoning, Etc. [PL]
- APJI 14.07 Damages—Total Taking [PL]
- APJI 14.08 Damages—Partial Taking [PL]
- APJI 14.09 Damages—Partial Taking Public Roads—Highway
Right Right-of-Ways, Etc. [PL]
- APJI 14.10 Single Tract—Unity of Use Test [PL]
- APJI 14.11 Limited or Loss of Access [PL]
- APJI 14.12 Right-of-Way for Access to Landlocked Land [PL]
- APJI 14.13 Inverse Condemnation [PL]
- APJI 14.14 Inverse Condemnation—Nuisance—Affirmative
Defense [PL]
- APJI 14.15 to 14.19 Reserved
- APJI 14.20 Expert Witnesses [PL]
- APJI 14.21 Lay Witness Opinion—Weight [PL]
- APJI 14.22 Comparable Sales [PL]
- APJI 14.23 Public or Private Knowledge of Project—Increase or
Loss of Value [PL]
- APJI 14.24 Site Visit [PL]
- APJI 14.25 Interest [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Date Approved	Prior Instruction Number
14.00 Introduction [PL]	2/6/15	14.00, 14.01, 14.02, 14.04
14.01 Just Compensation—Defined [PL]	3/20/15	14.05, 14.19
14.02 Valuation Date [PL]	3/20/15	14.06
14.03 Fair Market Value—Defined [PL]	3/20/15	14.07
14.04 Highest and Best Use [PL]	4/17/15	14.11
14.05 Prohibited Use—Zoning Ordinance, Etc. [PL]	4/17/15	14.12
14.06 Prohibited Use—Change in Zoning, Etc. [PL]	4/17/15	14.13
14.07 Damages—Total Taking [PL]	4/17/15	14.15
14.08 Damages—Partial Taking [PL]	4/17/15	14.16
14.09 Damages—Partial Taking—Public Roads—Highway Right-Of-Ways, Etc. [PL]	4/17/15	14.16
14.10 Single Tract—Unity of Use Test [PL]	4/17/15	14.10
14.11 Limited or Loss of Access [PL]	4/17/15	14.14
14.12 Right-of-Way for Access to Landlocked Land [PL]	4/17/15	New
14.13 Inverse Condemnation [PL]	3/20/15	14.20
14.14 Inverse Condemnation—Nuisance—Affirmative Defense [PL]	4/17/15	14.21
14.15 to 14.19	Reserved	
14.20 Expert Witnesses [PL]	4/17/15	14.08
14.21 Lay Witness Opinion—Weight [PL]	4/17/15	New
14.22 Comparable Sales [PL]	4/17/15	14.23
14.23 Public or Private Knowledge of Project—Increase or Loss of Value [PL]	4/17/15	14.17 and New
14.24 Site Visit [PL]	4/17/15	New
14.25 Interest [PL]	4/17/15	14.18

EMINENT DOMAIN

Title of Instruction	Date Approved	Prior Instruction Number
		14.03, 14.09, 14.22 (Deleted)

APJI 14.00 INTRODUCTION [PL]

Plaintiff (State of Alabama, etc.) filed this lawsuit to condemn (land) (land and buildings) that Defendant (name of defendant) owns. (Name of plaintiff) seeks to condemn (describe the property and the purpose of the project).

(Name of plaintiff) has the right to take property for public use and can do so without (name of defendant)'s consent. (Name of plaintiff) can take the ownership and possession of (name of owner)'s property but it must pay (name of defendant) just compensation. This is called the power of eminent domain.

When (name of plaintiff) uses this power it files a lawsuit to condemn the property. There are two issues in this lawsuit. (I decide if) (The parties have agreed that) (name of plaintiff) is entitled to an order of condemnation. You must determine the amount of just compensation, that is, the amount of the condemnation award to (name of defendant).

Approved February 6, 2015

Notes on Use

Use this instruction in any condemnation proceeding to explain and introduce the action. It combines and replaces APJI 14.00, 14.01, 14.02, and 14.04 (3d ed. 2014).

The Committee recommends that the user refer to the condemning authority as the plaintiff and the owner as the defendant. The titles will be reversed when the claim is for inverse condemnation.

References

The references may not include all constitutional and statutory provisions that relate to condemnation proceedings.

U.S. Const., amend V.

Ala. Const., art. I, § 23.

Ala. Const., art. XII, § 235.

Ala. Const., amend. XXII.

Ala. Code § 10A-20-15.01 (1975) (West's Alabama Code) (Water power companies granted authority of eminent domain).

Ala. Code § 10A-21-2.01 to 2.15 (1975) (West's Alabama Code) (Certain private corporations granted the right to take private property for public purposes).

Ala. Code § 11-47-170 (1975) (West's Alabama Code).

Ala. Code §§ 18-1A-1 to 311 (1975) (West's Alabama Code) (Alabama Eminent Domain Code).

Ala. Code §§ 18-3-1 to 3 (1975) (West's Alabama Code).

Ala. Code §§ 37-4-130, 131 (1975) (West's Alabama Code) (Electric public utilities granted authority to condemn right-of-way easements).

Dothan-Houston County Airport Authority, Inc. v. Horne, 292 Ala. 273, 292 So. 2d 656 (1974).

Dyer v. Tuscaloosa Bridge Co., 2 Port. 296, 1835 WL 543 (Ala. 1835).

West's Key Number Digest, Eminent Domain ⇨1.

Jenelle Mims Marsh, Alabama Law of Damages § 16:1 (6th ed. 2012).

6A William Meade Fletcher, et al., Fletcher Cyclopedia of the Law of Corporations § 2901 (perm. ed., rev. vol. 2013).

4 Tiffany Real Property §§ 1252 to 1254.1 (3d ed. 2014).

Philip Nichols, Nichols on Eminent Domain (1917).

Am. Jur. 2d, Eminent Domain §§ 1 to 10.

A.L.R. Library

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 A.L.R.4th 765.

Federal courts: federal or state law as applicable in determining what is property for which compensation must be paid upon its

APJI 14.00**ALABAMA PATTERN JURY INSTRUCTIONS**

taking by the Federal Government, 1 A.L.R. Fed. 479.

**APJI 14.01 JUST COMPENSATION—DEFINED
[PL]**

Just compensation is the payment of an award of money, if any, to (name of defendant), and it must put (him/her/it/them) in as nearly a good pecuniary position as (he/she/it/they) (was/were) in before the taking. But, it cannot put (him/her/it/them) in a better position than before the taking.

The term pecuniary position means it can be measured in money.

Neither party has the burden of proving the amount that you should award. You determine the amount to award based on all the evidence in this case.

Approved March 20, 2015

Notes on Use

This instruction combines APJI 14.05 and 14.19 (3d ed. 2014).

The term “just compensation” is defined different ways, and the amount of just compensation is not determined by one rigid formula.

The parenthetical “(, if any,)” should be included in the instruction when there is a partial taking and there is evidence that the value of the remaining property is enhanced to the point that it is worth more than the loss. E.g., *Southern Furniture Mfg. Co. v. Mobile County*, 276 Ala. 322, 161 So. 2d 805 (1963); *Conecuh County v. Carter*, 220 Ala. 668, 126 So. 132 (1930).

Neither party has the burden of proof on the issue of the amount of compensation, Ala. Code § 18-1A-153 (1975) (West’s Alabama Code); however this does not relieve the proponent of an issue from producing evidence on that issue. *Id.*, Commentary.

A pecuniary loss is a loss that can be measured in money. See APJI 17.20 and its notes on use.

References

U.S. Const., amend. V.

Ala. Const., art. I § 23.

Ala. Const., art. XII § 235.

Ala. Code § 18-1A-153 (1975) (West's Alabama Code).

Ala. Code § 18-1A-170 commentary (1975) (West's Alabama Code).

U.S. v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943).

Monongahela Nav. Co. v. U S, 148 U.S. 312, 326, 13 S. Ct. 622 (1893).

State v. Beard, 981 So. 2d 386 (Ala. 2007). Neither party has the burden of proof on the issue of just compensation.

State By and Through Alabama State Docks Dept. v. Atkins, 439 So. 2d 128 (Ala. 1983). Fair market value is not always the measure of just compensation. In this case the measure was determined under the "Substituted Facilities Doctrine."

Thomas v. State, 410 So. 2d 3, 4 (Ala. 1981). "Just compensation refers to the 'full monetary equivalent of the property taken.'" (quoting *Almota Farmers Elevator & Warehouse Co. v. U.S.*, 409 U.S. 470, 473 (1973).

White v. State, 294 Ala. 502, 319 So. 2d 247 (1975), cert. denied, 424 U.S. 954, 96 S. Ct. 1428, 47 L. Ed. 2d 359 (1976). Also see, *Jones, J.*, dissenting at 294 Ala. 502, 507 (a condemnation action is in the nature of a forced sale of property rights for an amount of money equal to its value).

Pickens County v. Jordan, 239 Ala. 589, 196 So. 121 (1940). The compensation awarded must be just to the owners and just to the public.

2,953.15 Acres of Land, More or Less, in Russell County, State of Ala. v. U.S., 350 F.2d 356 (5th Cir. 1965). The owner is to be put in as good pecuniary position as he would have occupied if his property had not been taken.

Garrow v. U.S., 131 F.2d 724 (5th Cir. 1942). Just compensation is a money sum equal to the value of the property or rights which have been taken.

Cf., *Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1372 (11th Cir. 2002) (challenge to Cable Rate set by Federal Communica-

tions Commission). “If the government commits a taking, it is under an obligation to put the aggrieved party in the position it was in before the taking occurred (but no better).”

Ala. Code § 18-1A-153 (1975) (West’s Alabama Code).

West’s Key Number Digest, Constitutional Law ☞4076.

West’s Key Number Digest, Eminent Domain ☞122, 200.

Jenelle Mims Marsh, Alabama Law of Damages § 16:1, 16:33 (6th ed. 2012).

4 Tiffany Real Property § 1254 (3d ed. 2014). Treatise discusses the substituted facilities doctrine.

1 William J. Rich, Modern Constitutional Law § 17:3 (3d ed. 2014).

Am. Jur. 2d, Eminent Domain §§ 112, 223 to 225.

A.L.R. Library

Who, as between condemnor and condemnee, bears risk of loss or destruction of property occurring after commencement but before completion of eminent domain proceedings, 89 A.L.R.2d 1076.

Attorney’s fees as within statute imposing upon condemner liability for “expenses,” “costs,” and the like, 26 A.L.R.2d 1295.

Federal courts: federal or state law as applicable in determining what is property for which compensation must be paid upon its taking by the Federal Government, 1 A.L.R. Fed. 479.

APJI 14.02 VALUATION DATE [PL]

The date of value in this case is _____. Your award must be based on the value of the property on that date.

Approved March 20, 2015

Notes on Use

This instruction presumes there is no dispute about the valuation date. The date the property is valued is the “date on which the application for order of condemnation is filed in the probate court or the date of taking of or damage to property by the condemnor whichever date first occurs.” Ala. Code § 18-1A-3(19) (1975) (West’s Alabama Code).

References

Ala. Code § 18-1A-3(19) (1975) (West’s Alabama Code).

Samford University v. City of Homewood, 959 So. 2d 64 (Ala. 2006), reh’g denied (Ala. Dec. 8, 2006).

State v. U. S. Steel Corp., 410 So. 2d 56 (Ala. 1982).

Kayo Oil Co. v. State, 340 So. 2d 756 (Ala. 1976).

Southern Natural Gas Co. v. Ross, 290 Ala. 195, 275 So. 2d 143 (1973).

West’s Key Number Digest, Eminent Domain ¶2.1, 124, 247(2), 261, 262(3).

Ala. Code § 8-8-10 (1975) (West’s Alabama Code).

Ala. Code § 18-1A-30(b) (1975) (West’s Alabama Code).

A.L.R. Library

Valuation at time of original wrongful entry by condemnor or at time of subsequent initiation of condemnation proceedings, 2 A.L.R.3d 1038.

**APJI 14.03 FAIR MARKET VALUE—DEFINED
[PL]**

The fair market value of property is the price it will sell for when it is offered for sale by a willing seller who is not forced to sell and it is bought by a willing buyer who is not forced to buy. You will assume the buyer and seller have considered the things that affect the property's value.

Approved March 20, 2015

Notes on Use

Use this instruction when market value is the correct measure of just compensation.

Ala. Code § 18-1A-172 (1975) (West's Alabama Code) is stated verbatim from APJI 14.07 (2d ed. 1993).

The terms “reasonable market value,” “cash market value,” “fair market value,” or “fair cash market value” are considered substantially synonymous and are often used interchangeably. *Housing Authority of Birmingham Dist. v. Title Guarantee Loan & Trust Co.*, 243 Ala. 157, 8 So. 2d 835 (1942). This interchange of terminology is also recognized in *U.S. v. Miller*, 317 U.S. 369, 373, 63 S. Ct. 276, 87 L. Ed. 336 (1943). Justice Roberts opined that using the word fair before the phrase market value lent little meaning, and the better wording is market value fairly determined. *Id.*

References

Ala. Code § 18-1A-172 (1975) (West's Alabama Code) states:

The fair market value as used in this chapter shall be defined as the price the property would bring when offered for sale by a willing seller who is not forced to sell and which is sought by a willing buyer who is not required to buy, after due consideration of all the elements affecting value.

White v. State, 294 Ala. 502, 319 So. 2d 247 (1975) (Jones, J., dissenting), cert. denied, 424 U.S. 954, 96 S. Ct. 1428, 47 L. Ed. 2d 359 (1976).

Popwell v. Shelby County, 272 Ala. 287, 130 So. 2d 170, 87 A.L.R.2d 1148 (1960).

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Housing Authority of Birmingham Dist. v. Title Guarantee Loan & Trust Co., 243 Ala. 157, 8 So. 2d 835 (1942). Theory of no market value.

West's Key Number Digest, Eminent Domain ⚙131.

Jenelle Mims Marsh, Alabama Law of Damages §§ 16:1 at 317, 16:29 (6th ed. 2012).

Am. Jur. 2d, Eminent Domain §§ 227 to 234.

A.L.R. Library

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 A.L.R.2d 1113.

Measure of damages for conversion or loss of, or damage to, personal property having no market value, 12 A.L.R.2d 902.

APJI 14.04 HIGHEST AND BEST USE [PL]

The value of (name of defendant)’s property must be determined based on its highest and best use. The highest and best use of property is a use for which it is reasonably suitable or adaptable. It is not an impossible, unreasonable or speculative use.

(Name of plaintiff) says the highest and best use of the property is (state the use). (Name of defendant) says the highest and best use of the property is (state the use). You determine the property’s highest and best use, and you will consider its present use when you make this determination.

If you find that the highest and best use of the property is (state the use) and that this use would increase the present market value of the property, you will consider this in determining the amount of the award. However, you do not set its value as if the higher use is an accomplished fact.

Approved April 17, 2015

Notes on Use

Use this instruction when there is evidence that the property is reasonably adapted for uses other than the use to which it was being put at the time of the taking and the prospective use would affect its present market value.

“Definitions of highest and best use vary slightly, but all essentially indicate that it is the highest and most profitable use for which the property is adaptable and for which it will be needed in the reasonably near future.” Jack R. Sperber, *Just Compensation and the Valuation Concepts you Need to Know to Measure it*. SP 007 ALI-ABA 1, 8 (2009). “The four appraisal criteria for [determining] highest and best use are: 1) legal permissibility, 2) physical possibility, 3) financial feasibility, and 4) maximum profitability.” *Id.* at 9.

References

Ala. Code § 18-1A-174 (1975) (West’s Alabama Code).

APJI 14.04**ALABAMA PATTERN JURY INSTRUCTIONS**

Ala. Code § 18-1A-193(2) (1975) (West's Alabama Code).

Historic Blakely Authority v. Williams, 675 So. 2d 350 (Ala. 1995).

State v. Bryant, 475 So. 2d 1184 (Ala. 1985).

State v. Commerce Center, Inc., 429 So. 2d 273 (Ala. 1983).

State v. Benderson, 366 So. 2d 276 (Ala. 1979).

State v. McDaniel, 285 Ala. 310, 231 So. 2d 878 (1970).

Sayers v. City of Mobile, 276 Ala. 589, 165 So. 2d 371 (1964).

State v. Goodwyn, 272 Ala. 618, 133 So. 2d 375 (1961).

Weldon v. State, 495 So. 2d 1113 (Ala. Civ. App. 1985), modified on other grounds and aff'd, Ex parte Weldon, 495 So. 2d 1121 (Ala. 1986).

West's Key Number Digest, Eminent Domain ⇨134, 202(4).

Jenelle Mims Marsh, Alabama Law of Damages §§ 16:29 n. 4, 16:42 (6th ed. 2012).

John Martinez, Government Takings § 3:31 (2007).

11A Eugene McQuillin, McQuillan Municipal Corporations § 32:103 (3d ed. 2009 rev. vol.).

Am. Jur. 2d, Eminent Domain §§ 249, 250.

Jack R. Sperber, Just Compensation and the Valuation Concepts you Need to Know to Measure it. SP 007 ALI-ABA 1 (2009).

A.L.R. Library

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 A.L.R.3d 1267.

**APJI 14.05 PROHIBITED USE—ZONING
ORDINANCE, ETC. [PL]**

The rule that the property's value must be determined based on its highest and best use envisions a lawful use. A lawful use is one that is not prohibited by laws or a zoning ordinance. You cannot determine value based solely on an unlawful use.

Approved April 17, 2015

Notes on Use

Use this instruction when a witness's opinion about value is based on comparable properties but the comparable properties are zoned differently than the property condemned.

See APJI 14.10, Expert Witnesses, and APJI 14.12, Comparable Sales.

References

Historic Blakely Authority v. Williams, 675 So. 2d 350 (Ala. 1995).

State v. Waller, 395 So. 2d 37 (Ala. 1981).

State v. Benderson, 366 So. 2d 276, 278 (Ala. 1979).

Sayers v. City of Mobile, 276 Ala. 589, 165 So. 2d 371 (1964).

West's Key Number Digest, Eminent Domain ☞134, 150, 202(4).

West's Key Number Digest, Evidence ☞555, 555.6.

APJI 14.06 PROHIBITED USE—CHANGE IN ZONING, ETC. [PL]

On (date of value) (state the statute or zoning ordinance) prohibited the property from being used for (highest and best use). But, (name of defendant) says there is a likelihood the (statute/zoning ordinance will be changed) (exceptions will be made) to allow the use. (Name of defendant) says you should consider this when you set the amount of the award.

You can consider any change in use if you are reasonably satisfied from the evidence:

1. There is a likelihood that the (statute/ordinance will be changed) (exceptions will be made) to allow the property to be used for (use); and,
2. The (change/exception) will happen in the reasonably near future.

But, if you are reasonably satisfied about these things you cannot value the property as if it could be used for (use) on (date of value). This is just something you can consider along with the fact that on (date of value) the property could not be used for (use).

Approved April 17, 2015

Notes on Use

Use this instruction when there is substantial evidence of the likelihood that the existing restrictions on use will be removed or the property will be excepted from the use restrictions that exist on the date of value.

References

Sayers v. City of Mobile, 276 Ala. 589, 165 So. 2d 371 (1964).

See, Historic Blakely Authority v. Williams, 675 So. 2d 350 (Ala. 1995), as modified on denial of reh'g, (Dec. 15, 1995), Houston, J., dissenting.

West's Key Number Digest, Eminent Domain ☞202(4).

4 Julius Sackman, Nichols, The Law of Eminent Domain § 12B.15 (3d ed. 2012).

Am. Jur. 2d, Eminent Domain §§ 277, 388, 442, 518.

A.L.R. Library

Validity of zoning laws setting minimum lot size requirements, 1 A.L.R.5th 622.

Validity and construction of “zoning with compensation” regulation, 41 A.L.R.3d 636.

Zoning as a factor in determination of damages in eminent domain, 9 A.L.R.3d 291.

APJI 14.07 DAMAGES—TOTAL TAKING [PL]

In this case (name of plaintiff) condemns all (name of defendant's/defendants') property. You must award (him/her/it/them) the fair market value of the property as of (date of value).

Approved April 17, 2015

Notes on Use

See APJI 14.03 for definition of fair market value.

See APJI 14.02 for “date of taking.”

References

White v. State, 294 Ala. 502, 507, 319 So. 2d 247 (1975) (Jones, J., dissenting), cert. denied, 424 U.S. 954, 96 S. Ct. 1428, 47 L. Ed. 2d 359 (1976).

Housing Authority of Birmingham Dist. v. Title Guarantee Loan & Trust Co., 243 Ala. 157, 8 So. 2d 835 (1942).

Dean v. County Board of Education, 210 Ala. 256, 97 So. 741 (1923).

West's Key Number Digest, Eminent Domain ☞131.

Am. Jur. 2d, Eminent Domain § 266.

A.L.R. Library

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 A.L.R.4th 863.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation, 51 A.L.R.3d 1050.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 A.L.R.3d 860.

Measure of damages for condemnation of cemetery lands, 42 A.L.R.3d 1314.

Measure and elements of damage for limitation of access

caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 148.

Eminent domain: cost of substitute facilities as measure of compensation to state or municipality for condemnation of public property, 40 A.L.R.3d 143.

Eminent domain: deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, 13 A.L.R.3d 1149.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

Eminent domain: Use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change, 2 A.L.R.3d 985.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 A.L.R.2d 772.

Right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 A.L.R.2d 588.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 A.L.R.2d 1453.

Compensation or damages for condemning a public utility plant, 68 A.L.R.2d 392 (secs. 42, 43 superseded in part Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 A.L.R.4th 1263).

Municipal power as to billboards and outdoor advertising, 58 A.L.R.2d 1314.

Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Application in federal eminent domain proceedings of rule that subsequent enlargement of public project to include lands adjacent to, but not within scope of, project from time government was committed to it, entitles condemnee to value added in

APJI 14.07**ALABAMA PATTERN JURY INSTRUCTIONS**

meantime by proximity of public improvement, 14 A.L.R. Fed. 806.

APJI 14.08 DAMAGES—PARTIAL TAKING [PL]

(Name of plaintiff) took only part of (name of defendant)’s land and this is called a partial taking.

To determine just compensation, you must first determine the fair market value of the entire property on the date of value. This is called before value. Then you must determine, based on the date of value, the fair market value of the remaining property after the taking with the project in place. (You must take into consideration the negative impact, if any, on the remaining property). That is called the after value. You will award (name of defendant) an amount of money equal to the difference, if any, between the before and after values.

The word property means the land (and improvements).

Approved April 17, 2015

Notes on Use

Use this instruction when the petitioner condemns part of the owner’s property. It is based on Ala. Code § 18-1A-170(b) (1975) (West’s Alabama Code). The phrase “entire property” leads to disputed issues about what is the entire property when the owner owns numerous tracts.

Ala. Code § 18-1A-173 (1975) (West’s Alabama Code) states some circumstances that will or will not affect the property’s value. Subsection (c) can present a jury issue.

Use APJI 14.08A when the project is a highway right-of-way, a public highway, or water or sewer lines and there is evidence that the project benefits the defendant’s remaining property.

Ala. Code § 18-1A-194 (1975) (West’s Alabama Code) states some admissible factors to support opinion evidence about the value of the remaining property when there is a partial taking.

References

Ala. Code § 18-1A-170(b) (1975) (West’s Alabama Code) states:

If there is a partial taking, the valuation rule is the difference between the fair market value of the entire property before the taking and the fair market value of the remainder after the taking.

Ala. Code §§ 18-1A-171, 18-1A-194 (1975) (West's Alabama Code).

State v. Williams, 386 So. 2d 426 (Ala. 1980).

Southern Furniture Mfg. Co. v. Mobile County, 276 Ala. 322, 161 So. 2d 805 (1963).

Morgan County v. Hill, 257 Ala. 658, 60 So. 2d 838 (1952).

West's Key Number Digest, Eminent Domain ⇐136, 145(4), 202(4).

Jenelle Mims Marsh, Alabama Law of Damages §§ 16:11, 16:12, 16:29, 16:32, 16:41 (6th ed. 2012).

Am. Jur. 2d, Eminent Domain § 266.

A.L.R. Library

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 A.L.R.4th 1263.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 A.L.R.4th 863.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor in fixing compensation, 51 A.L.R.3d 1050.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 A.L.R.3d 860.

Measure of damages for condemnation of cemetery lands, 42 A.L.R.3d 1314.

Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 148.

Eminent domain: cost of substitute facilities as measure of compensation to state or municipality for condemnation of public property, 40 A.L.R.3d 143.

Eminent domain: deduction of benefits in determining compensation or damages in proceedings involving opening, widening, or otherwise altering highway, 13 A.L.R.3d 1149.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 A.L.R.3d 901.

Eminent domain: Use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change, 2 A.L.R.3d 985.

Changes in purchasing power of money as affecting compensation in eminent domain proceedings, 92 A.L.R.2d 772.

Right to damages or compensation upon condemnation of property, of holder of unexercised option to purchase, 85 A.L.R.2d 588.

Relative rights and liabilities of abutting owners and public authorities in parkways in center of street, 81 A.L.R.2d 1436.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 A.L.R.2d 1453.

Municipal power as to billboards and outdoor advertising, 58 A.L.R.2d 1314.

Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73.

Damage to private property caused by negligence of governmental agents as “taking,” “damage,” or “use” for public purposes, in constitutional sense, 2 A.L.R.2d 677.

Application in federal eminent domain proceedings of rule that subsequent enlargement of public project to include lands adjacent to, but not within scope of, project from time government was committed to it, entitles condemnee to value added in meantime by proximity of public improvement, 14 A.L.R. Fed. 806.

**APJI 14.09 DAMAGES—PARTIAL TAKING
PUBLIC ROADS—HIGHWAY RIGHT
RIGHT-OF-WAYS, ETC. [PL]**

(Name of plaintiff) took only part of (name of defendant's) property, and this is called a partial taking. (Name of plaintiff) took the property to build a (road/highway/water or sewer line/beach project).

To determine just compensation, you must first determine the fair market value of the entire property on the date of value. This is called the before value. Then you must determine, based on the date of value, the fair market value of the remaining property after the taking with the project in place. You must take into consideration the negative and positive impacts of the project on the value of the remaining property, if any. That is called the after value. You will award (name of owner) an amount of money that is equal to the difference, if any, between the before and after values.

Approved April 17, 2015

Notes on Use

This instruction is based on Ala. Code § 18-1A-170 & 171 (1975) (West's Alabama Code). It assumes a party introduced evidence of either negative or positive impacts on the value of the remaining property, and the instruction must be modified to accommodate the evidence or lack of evidence on either point. It also assumes the project is going forward.

Ala. Code 18-1A-171 (1975) (West's Alabama Code) applies to public ways; rights-of-way for public highways, water or sewer lines; and proceedings by water conservancy districts and water management districts. It also applies to proceedings for "condemnation of lands, rights, easements, or interests in land, lying seaward of the construction control line. . . , for use by a coastal municipality in the establishment and maintenance of a beach project permitted pursuant to Section 9-15-56."

Ala. Code § 18-1A-2 (1975) (West's Alabama Code) states the Eminent Domain Code is primarily a procedural code that, among

other things, sets standards for condemnation actions. It expressly supplements Alabama law, but in the event of a conflict between the Code and the existing law, the Code governs procedural and substantive issues. See § 18-1A-2 commentary.

References

Ala. Code § 18-1A-171 (1975) (West's Alabama Code) states:

The amount of compensation to which the owners and other parties interested therein are entitled must not be reduced or diminished because of any incidental benefits which may accrue to them or to their remaining lands in consequence of the uses to which the lands to be taken or in which the easement is to be acquired will be appropriated; provided, that in the condemnation of lands for ways and rights-of-way for public highways, water or sewer lines, the commissioners or jury may, in fixing the amount of compensation to be awarded the owner for lands taken for this use, take into consideration the value of the enhancement to the remaining lands of such owner that such highway, water or sewer lines may cause; and provided further, that in proceedings instituted by water conservancy districts and water management districts, benefits accruing to the landowner from an improvement may be considered and allowed as a setoff against the damages to be awarded, but benefits derived from improvements other than the improvement for which the land is condemned cannot be considered; and provided further, that in the condemnation of lands, rights, easements, or interests in land, lying seaward of the construction control line then in effect under the regulations of the Alabama Department of Environmental Management, the ordinances of a coastal municipality, or both, for use by a coastal municipality in the establishment and maintenance of a beach project permitted pursuant to Section 9-15-56, the commissioners or jury, in fixing the amount of compensation to be awarded the owner for the lands, rights, easements, or interests lying seaward of the construction control line taken for such use, shall take into consideration the value of the enhancement to the remaining lands of the owner that the beach project may cause as the result of the placement of sand directly on and directly seaward of the lands, or rights, easements, or interests in land so taken. To the extent, and only to the extent, that sand is placed directly on and directly seaward of the lands, or rights, easements, or interests in land so taken, the commissioners or jury may presume:

- (1) That the value of the remaining lands of the owner will

exceed the value of all lands, rights, easements, and interests of the owner prior to the taking as a result of the enhancement in value resulting from the beach project.

(2) That the owner has sustained no damage and is entitled to no compensation as a result of the taking.

The presumptions shall be rebutted only by substantial evidence adduced by the owner.

See the case authorities annotated under this code section.

**APJI 14.10 SINGLE TRACT—UNITY OF USE
TEST [PL]**

The Committee will not publish an instruction on Single Tract—Unity of Use because Alabama law is not sufficiently developed on this point of law. The Committee notes APJI 14.10 (3d ed. 2014) was first published in the 1973 edition and has not been changed. That instruction was not based on Alabama case law; however, the Committee now references Alabama cases the user can consult when he or she must draft an instruction.

Ala. Code § 18-1A-170(b) (1975) (West’s Alabama Code) applies when there is a partial taking and it states: “[T]he valuation rule is the difference between the fair market value of the **entire** property before the taking and the fair market value of the remainder after the taking.” (emphasis supplied).

No Alabama appellate court decision opines about all the elements required for lands to be one economic unit. The parties in *Weldon v. State*, 495 So. 2d 1113 (Ala. Civ. App. 1985), modified on other grounds and aff’d, *Ex parte Weldon*, 495 So. 2d 1121 (Ala. 1986), agreed several tracts can be one tract when there is (1) unity of title or ownership, (2) physical contiguity, and (3) unity of use. The *Weldon* Court opined that unity of title or ownership requires “identical ownership of each parcel.” *Weldon v. State* at 1115. The Court did not discuss unity of use or contiguity; however, the Committee believes the law does not require strict contiguity.

Approved April 17, 2015

References

Weldon v. State, 495 So. 2d 1113 (Ala. Civ. App. 1985), modified on other grounds and aff’d, *Ex parte Weldon*, 495 So. 2d 1121 (Ala. 1986).

Dean v. County Board of Education, 210 Ala. 256, 97 So. 741 (1923).

Alabama Power Co. v. Carden, 189 Ala. 384, 66 So. 596 (1914).

Alabama Cent. R. Co. v. Musgrove, 169 Ala. 424, 53 So. 1009 (1910).

Long Distance Telephone & Telegraph Co. v. Schmidt, 157 Ala. 391, 47 So. 731, 733 (1908).

Mobile & O.R. Co. v. Hester, 122 Ala. 249, 25 So. 220 (1899).

Mobile & O.R. Co. v. Postal Tel. Cable Co., 120 Ala. 21, 24 So. 408 (1898).

City of Eufaula, Ala. v. Pappas, 213 F. Supp. 749 (M.D. Ala. 1963), disapproved of on other grounds, Caribbean Mills, Inc. v. Kramer, 392 F. 2d 387 (5th Cir. 1968).

West's Key Number Digest, Eminent Domain ☞96, 131, 136, 137, 138, 203(1).

4A Julius Sackman, Nichols, The Law of Eminent Domain § 14B.01 (3d ed. 2012).

Am. Jur. 2d, Eminent Domain §§ 265, 315 to 320.

29A C.J.S., Eminent Domain § 140 (2007).

Warren C. Herlong & J. Casey Pipes, What Constitutes the Parent Tract for Purposes of Ascertaining Value and Damages?—A Primer for Shaping the Parent Tract, SK045 ALI-ABA 191 (2005).

A.L.R. Library

Unity of ownership necessary to allowance of severance damages in eminent domain, 95 A.L.R.2d 887.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit, 1 A.L.R.2d 878.

**APJI 14.11 LIMITED OR LOSS OF ACCESS
[PL]**

(Name of defendant) has a right of access to the (street) (highway), and this access is being condemned. You will consider this loss of access when you determine your award.

Approved April 17, 2015

Notes on Use

Use this instruction when there is no disputed issue of fact that the right of access to the proposed construction is being condemned.

A variation on this situation is when the access is not condemned but the condemnation results in the restriction of access. The Committee will not publish an instruction that addresses this situation.

References

Ala. Code § 18-1A-194(2) (1975) (West's Alabama Code).

State v. Compton, 502 So. 2d 1205 (Ala. 1987).

Davis v. State, 346 So. 2d 936 (Ala. 1977).

State v. Payton, 273 Ala. 49, 134 So. 2d 198 (1961).

St. Clair County v. Bukacek, 272 Ala. 323, 131 So. 2d 683 (1961).

Blount County v. Campbell, 268 Ala. 548, 109 So. 2d 678 (1959).

Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117 (1958).

West's Key Number Digest, Eminent Domain ¶85, 100(6), 106.

West's Key Number Digest, Evidence ¶474(18).

Jenelle Mims Marsh, Alabama Law of Damages § 16:22 (6th ed. 2012).

APJI 14.11**ALABAMA PATTERN JURY INSTRUCTIONS**

10A Eugene McQuillin, McQuillin Municipal Corporations
§ 30:53 (3d ed. 2014).

4 Tiffany Real Property § 1253 (3d ed. 2014).

Am. Jur. 2d, Eminent Domain §§ 157, 178.

A.L.R. Library

Measure and elements of damage for limitation of access
caused by conversion of conventional road into limited-access
highway, 42 A.L.R.3d 148.

**APJI 14.12 RIGHT-OF-WAY FOR ACCESS TO
LANDLOCKED LAND [PL]**

(Name of plaintiff) filed this lawsuit to condemn a (____) foot wide right-of-way across (name of defendant)'s land.

The owner of landlocked land can file a lawsuit to get up to a thirty foot right-of-way for a road from (his/her/its) land to a nearby public road. (He/she/it) must pay (name of defendant) for the right-of-way. (Name of plaintiff) is not taking ownership of (name of defendant)'s land and (name of plaintiff) can use the right-of-way only to get to and from (his/her/its) land.

There are two issues in this lawsuit. I decide if (name of plaintiff) is entitled to condemn the right-of-way. You must determine the amount of just compensation for the right-of-way, that is, the amount of the condemnation award to (name of defendant).

To determine the award first determine the value of the entire property immediately before (date). Then, determine the value of the property with the right-of-way across it. The difference between the values is the amount of money of your award.

Approved April 17, 2015

Notes on Use

The Alabama Eminent Domain Act controls condemnation proceeding to acquire a right-of-way for ingress and egress. *Weeks v. Herlong*, 31 So. 3d 122, 124-25 (Ala. Civ. App. 2009) (quoting *Paulk v. McCarty*, 855 So. 2d 1123, 1126 (Ala. Civ. App. 2003)).

The trial judge should consider whether trying the jury and nonjury issue together will prejudice the servient landowner. When it is probable that evidence of the servient landowner's wealth will be interjected the trial court should strongly consider separating the issues. See, *Southern Elec. Generating Co. v. Leibacher*, 269 Ala. 9, 110 So. 2d 308, 310 (1959) (issues must be bifurcated).

However, Leibacher has not been cited for this issue, and the Alabama Eminent Domain Code does not address this question.

References

Ala. Code §§ 18-3-1 to 3 (1975) (West's Alabama Code).

Weeks v. Herlong, 31 So. 3d 122, 124-25 (Ala. Civ. App. 2009).

Key v. Ellis, 973 So. 2d 359 (Ala. Civ. App. 2007).

Paulk v. McCarty, 855 So. 2d 1123, 1126 (Ala. Civ. App. 2003).

West's Key Number Digest, Eminent Domain ☞18(1), 55, 56, 166, 172, 196, 255.

West's Key Number Digest, Private Roads ☞1.

Jenelle Mims Marsh, Alabama Law of Damages § 26:1 (6th ed. 2012).

Ally Windsor Howell, Tilley's Alabama Equity § 17.1 to 17.5 (5th ed. 2014).

APJI 14.13 INVERSE CONDEMNATION [PL]

(Name of defendant) has the right to take property for public use and can do so without (name of plaintiff)'s consent. (Name of defendant) can take the ownership and possession of (name of plaintiff)'s property but it must pay (name of plaintiff) just compensation. This is called the power of eminent domain.

When (name of defendant) uses this power it files a lawsuit to condemn the property. An inverse condemnation is when an authority with the power of eminent domain takes, or injures, or destroys property without paying for it and without filing a lawsuit to condemn it. (Name of plaintiff) sues (name of defendant) for inverse condemnation.

(Name of plaintiff) says (name of defendant) (took/injured/destroyed) (describe the property or property right) when (state the conduct and describe the project).

To recover (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of defendant) has the power of eminent domain;
2. That (name of defendant) (state how the plaintiff's property was taken/injured/destroyed); and,
3. That (name of defendant) caused this when (describe the project, e. g., defendant was widening 20th Street North).

If (name of plaintiff) proved all these things you must find for (him/her/it), and then you must determine the amount of compensation to award (name of plaintiff).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved March 20, 2015

Notes on Use

Use this instruction in any case when the landowner claims the state, a city, county, or other authority with the powers of eminent domain took or damaged the property or a property right, e. g., the right of access, without formal condemnation proceedings.

There is no cause of action for inverse condemnation unless the authority's conduct physically disturbed the landowner's property, or had a direct physical impact on the property, or physically interfered with the landowner's public or private rights in connection with the use of the property. *Alabama Power Co. v. City of Guntersville*, 235 Ala. 136, 143-44, 177 So. 332 (1937); *Housing Authority of Birmingham Dist. v. Logan Properties, Inc.*, 127 So. 3d 1169, 1177 (Ala. 2012).

A landowner who prevails in an inverse condemnation action can recover litigation expenses (as defined in § 18-1A-3(12)). Ala. Code § 18-1A-32(b) (1975) (West's Alabama Code). *Ex parte Alabama Dept. of Transp.*, 143 So. 3d 730, 740 n.3 (Ala. 2013) (four Justices concurring in the result).

The Alabama Eminent Domain Code “does not purport to supply rules for inverse condemnation actions (except as provided in § 18-1A-32).” Section 18-1A-2 commentary.

References

City of Daphne v. Fannon, Ms. 1180109, 2019 WL 6649355 (Ala. Dec. 6, 2019). In this inverse condemnation claim, the city was due judgment as a matter of law because the injuries claimed were not foreseeable, and damages the landowner claimed were not ascertainable at the time of construction.

Porterville Bay Oyster Company, LLC v. Blankenship, 275 So. 3d 124 (Ala. 2018). Inverse condemnation of aquaculture leases and rights to cultivate oysters on the bay's floor.

Town of Gurley v. M & N Materials, Inc., 143 So. 3d 1 (Ala. 2012). Neither Ala. Const. art I, § 23 nor Ala. Const. art. XII, § 235 provide for a claim for inverse condemnation based on a regulatory taking.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). In the Supreme Court of the United States Fifth Amendment takings jurisprudence there are “two cat-

egories of regulatory action that generally will be deemed per se takings . . .”

Housing Authority of Birmingham Dist. v. Logan Properties, Inc., 127 So. 3d 1169, 1174 (Ala. 2012). The elements of a claim for inverse condemnation are: “(1) the defendant is an entity ‘invested with the privilege of taking property for public use’; (2) that the plaintiff’s property was ‘taken, injured, or destroyed’; and (3) that the taking, injury, or destruction was caused ‘by the construction or enlargement of [the defendant’s] works, highways, or improvements.’” (quoting, in part, *Jefferson County v. Southern Natural Gas Co.*, 621 So. 2d 1282, 1287 (Ala. 1993).

Ala. Const., art. I, § 23.

Ala. Const. art. XII, § 235.

Ala. Code §§ 18-1A-28, 32, 150, 151 (1975) (West’s Alabama Code).

State v. Armstrong, 779 So. 2d 1211 (Ala. 2000). A property owner who prevails in an inverse condemnation case is entitled to recover litigation expenses in addition to just compensation for the taking. Ala. Code § 18-1A-32(b) (1975) (West’s Alabama Code). A property owner is not entitled to an award of litigation expenses when the condemning authority brings a condemnation action against the property owner.

Ex parte Alabama Dept. of Transp., 143 So. 3d 730, 740 n.3 (Ala. 2013) (four Justices concurring in the result).

Drummond Co., Inc. v. Ala. Dept. of Transp., 937 So. 2d 56, 58 (Ala. 2006), abrogated in part, *Ex parte Moulton*, 116 So. 3d 1119 (Ala. 2013).

Jefferson County v. Southern Natural Gas Co., 621 So. 2d 1282 (Ala. 1993). In formal condemnation proceedings the trial court determines whether the authority had the right to condemn, and the jury determines the compensation. In inverse condemnation cases, the jury decides if the landowner’s property or a property right was taken or injured, and if so, it determines the compensation.

Town & Campus Apartments, Inc. v. Kemp, 548 So. 2d 436 (Ala. 1989). Action for inverse condemnation brought against individual agents of the state.

Sima Properties, L.L.C. v. Cooper, 236 So. 3d 857 (Ala. Civ. App. 2017).

Danforth v. U.S., 308 U.S. 271, 285, 60 S. Ct. 231, 84 L. Ed. 240 (1939). Changes in the value of property that are considered incidents of ownership are not takings in the “constitutional sense.”

West’s Key Number Digest, Eminent Domain ⌘55(5), 266, 270, 284.

Jenelle Mims Marsh, Alabama Law of Damages §§ 16:16, 16:28, 16:34 (6th ed. 2012).

2 Ally Windsor Howell, Alabama Personal Injury and Torts § 10:10 (2014).

11A Eugene McQuillin, McQuillin the Law of Municipal Corporations §§ 32.80, 32.158 (3d ed. 2014).

Am. Jur. 2d, Eminent Domain §§ 684 to 690.

George W. Royer, Jr., et al., “Regulatory Takings” Claims Under the Alabama Constitution Following Town of Gurley v. M&N Materials, 76 Ala. Law 23 (Jan., 2015).

**APJI 14.14 INVERSE CONDEMNATION—
NUISANCE—AFFIRMATIVE
DEFENSE [PL]**

(Name of defendant) says it was using its police powers to abate a public nuisance on (name of plaintiff)'s land. It says the public nuisance was (state the activity and effect).

A public nuisance is an activity that affects the health, safety, convenience, or moral welfare of the general public. It does not matter if the activity is lawful. The condition must be the kind that would affect ordinary reasonable persons; but not one that would affect only fussy, picky, difficult, or hard to please persons.

To prove this defense, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of plaintiff) caused (state the activity or conduct);
2. That the (state the activity or conduct) affected the general public who were exposed to it; and,
3. That the activity or conduct affected the health, safety, convenience, or moral welfare of the general public.

If (name of defendant) proved all these things, you will find for (name of defendant) and against (name of plaintiff).

Approved April 17, 2015

Notes on Use

Use this instruction when the state, county or city takes, injures or destroys the owner's property but the authority pleaded its police power as a defense to its action.

References

Ala. Code §§ 6-5-120 to 160.4 (1975) (West's Alabama Code).

APJI 14.14**ALABAMA PATTERN JURY INSTRUCTIONS**

West's Key Number Digest, Nuisance ¶59 to 70.

APJI 14.15 to 14.19

Reserved

APJI 14.20 EXPERT WITNESSES [PL]

(Name of expert witness(s)) testified as experts and gave opinions about property values (other subjects). They are called experts because they have specialized knowledge or skill from their education, training or experience.

They were allowed to testify to help you understand the evidence or decide facts.

You will consider the experts’ testimony together with all other evidence in this case. But, you do not have to accept experts’ opinions and testimony just because they are experts. You will determine their credibility just like you determine the credibility of the other witnesses.

Approved April 17, 2015

Notes on Use

Use this instruction when either or both parties offer expert testimony about value or other issues in the case. The instruction must be modified when only one expert testifies.

Condemnation actions are governed by the rules of evidence that apply to other civil actions and as supplemented in Title 18, Article 11. Section 18-1A-190(a).

Ala. Code §§ 18-1A-192 to 197 (1975) (West’s Alabama Code) supplements Alabama law about who can give opinion evidence and the scope of opinion evidence in condemnation actions. The “elements of [a proper] foundation and the qualifications of an expert are determined by other Alabama law and rules of procedure.” Section 18-1A-192 commentary.

The user must consult Ala. Code §§ 18-1A-193 to 197 (1975) (West’s Alabama Code) which state the factors that can or cannot form the basis of the lay or expert witness’s opinion.

References

See references in APJI 15.05 to 15.07.

Ala. Code § 18-1A-190(a) (1975) (West’s Alabama Code).

Ala. R. Evid. 701 to 706.

Ala. Code § 12-21-114 (1975) (West's Alabama Code).

Ala. Code §§ 18-1A-192 to 197 (1975) (West's Alabama Code).

Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959). The jury determines the credibility and weight of the expert witness's testimony.

Thornton v. City of Birmingham, 250 Ala. 651, 35 So. 2d 545 (1948). Facts in support of expert opinion do not become independent evidence.

Batterton v. City of Birmingham, 218 Ala. 489, 119 So. 13 (1928). The jury is not bound by the opinion of experts.

West's Key Number Digest, Eminent Domain ⇨201 to 203(7).

West's Key Number Digest, Evidence ⇨485, 521, 524, 555.6, 570, 571(7).

West's Key Number Digest, Trial ⇨139(1).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 7:14, 7:17, 7:26, 7:34, 7:42 (3d ed. 2013, Joseph J. Lester update).

1 Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* §§ 85.1, 85.02, 85.03, 127.01, 127.02, 128.11 (6th ed. 2009).

Am. Jur. 2d, Eminent Domain §§ 523 to 525.

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Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses, 68 A.L.R.3d 546.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 A.L.R.2d 1113.

**APJI 14.21 LAY WITNESS OPINION—WEIGHT
[PL]**

(Name of witness) testified to (his/her) opinion about property value.

When deciding the facts you are not bound by the opinion. You must give it the weight you believe it deserves, and you will consider (his/her) opinion testimony together with the rest of the evidence in this case.

Approved April 17, 2015

Notes on Use

Use this instruction when a lay witness testifies about property value. It must be modified when more than one lay witness testifies.

A lay witness can testify about market value if he or she “has had an opportunity for forming a correct opinion.” Ala. Code § 12-21-114 (1975) (West’s Alabama Code). Upon proper foundation, the property owner may testify to his or her opinion about the property’s value. Ala. Code § 18-1A-192(a)(2) (1975) (West’s Alabama Code). The user must consult Ala. Code §§ 18-1A-193 to 197 (1975) (West’s Alabama Code) which state the factors that can or cannot form the basis of the lay or expert witness’s opinion.

References

Ala. Code § 12-21-114 (1975) (West’s Alabama Code).

Ala. Code §§ 18-1A-192(a)(2), 193 to 197 (1975) (West’s Alabama Code).

See references to APJI 15.05.

APJI 14.22 COMPARABLE SALES [PL]

Witnesses have testified to their opinions of the market value of the property and the basis for their opinions. One thing the witnesses' opinions are based on is comparable sales.

Whether the sales are comparable is something you will consider when you decide how much weight, if any, to give their opinions. A sale is comparable if:

1. The sale was made within a reasonable time before or after (the date of value); and,
2. The property is sufficiently similar in location, size, usability, improvements, and other characteristics.

You decide how much weight, if any, to give this testimony.

Approved April 17, 2015

Notes on Use

Use this instruction when opinion evidence has been offered based upon comparable sales. The instruction must be modified if the opinion testimony was based on factors other than comparable sales, or if only one witness based his or her opinion about value on comparable sales.

Ala. Code § 18-1A-196(2) (1975) (West's Alabama Code) states the criteria a sale must meet before it is admitted as evidence of a comparable sale. Thus, it is a rule of evidence that guides the trial judge. Once the evidence is admitted, the jury determines the weight of the evidence. See Ala. Code § 18-1A-192 (1975) (West's Alabama Code) commentary.

“‘Broad latitude in admissibility should be given in applying [§ 18-1A-196(2)], . . .’” State v. Cockrell, 566 So. 2d 1282, 1283-84 (Ala. 1989) (quoting State v. Hartley, 519 So. 2d 924, 925-26 (Ala. 1988)).

Ala. Code § 18-1A-197 (1975) (West's Alabama Code) lists factors upon which opinion evidence cannot be based.

See APJI 14.10, Expert Witness and APJI 14.11, Lay Witnesses.

References

Ala. Code § 18-1A-196(2) (1975) (West's Alabama Code).

State v. Cockrell, 566 So. 2d 1282, 1283 (Ala. 1989). Whether a sale is completely voluntary goes to its weight.

But see, State v. Cooper, 420 So. 2d 771 (Ala. 1982) (sale under threat of condemnation is involuntary and inadmissible).

State v. Hartley, 519 So. 2d 924, 925-26 (Ala. 1988).

West's Key Number Digest, Eminent Domain ⇨202(2).

West's Key Number Digest, Evidence ⇨142(.5)–(5), 145, 501(7), 555.6.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 4:8 (3d ed. 2013, Joseph J. Lester update).

1 Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 85.01, 85.02(2), 85.03, 85.04, 128.11 (6th ed. 2009).

Jenelle Mims Marsh, Alabama Law of Damages § 12:2(5), 16:47 (6th ed. 2012).

1 Lewis Orgel, Orgel on Valuation Under Eminent Domain §§ 128 to 135 (2d ed. 1953).

Am. Jur. 2d, Eminent Domain §§ 537 to 541.

**APJI 14.23 PUBLIC OR PRIVATE
KNOWLEDGE OF PROJECT—
INCREASE OR LOSS OF VALUE
[PL]**

Public or private knowledge about a proposed public improvement or project may cause the property's value to increase or decrease. If this happened, you will disregard the increase or decrease when you determine the property's fair market value on the valuation date.

If you are reasonably satisfied by the evidence that the property increased or decreased in value before the valuation date, and its value changed because of public or private knowledge about:

1. The proposed improvement or project for which the property was to be taken;
2. There was a reasonable likelihood the property would be bought for the improvement or project, or;
3. The condemnation action in which the property is taken;

You will not consider the loss or increase in value when you determine the fair market value of the property.

Loss of value because of owner's neglect.

However, you may consider the loss in value if the property lost value because:

1. It physically deteriorated; and,
2. This was caused by (name of defendant)'s unjustified neglect.

Approved April 17, 2015

Notes on Use

This instruction supplements APJI 14.07; 14.08; and 14.09, and it is based on Ala. Code § 18-1A-173(a) & (c) (1975) (West's Alabama Code). The trial judge will give the instruction only if substantial evidence supports it.

This instruction does not instruct on § 18-1A-173(b).

Section 18-1A-173 “does not identify a specific point in time to govern the exclusion of the indicated changes in value.” The application of the rule is one of factual causation. *Id.* commentary.

References

Ala. Code § 18-1A-173 (1975) (West's Alabama Code).

U.S. v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943).

West's Key Number Digest, Eminent Domain ☞124, 131, 137, 144.

Jenelle Mims Marsh, Alabama Law of Damages § 16:44 (6th ed. 2012).

Am. Jur. 2d, Eminent Domain §§ 254, 291 to 293.

APJI 14.24 SITE VISIT [PL]

The court will allow you to visit the property. The only purpose of this visit is to help you understand the opinion testimony about the value of the property. What you see is not independent evidence you can use to determine the award.

While you are at the property you cannot ask any questions or talk to anyone else at the property and this includes your fellow jurors.

(Keep in mind there have been some changes in the property since (date of value)).

Approved April 17, 2015

Notes on Use

This instruction is new and based on Ala. Code § 18-1A-191 (1975) (West's Alabama Code) and it should be given before the jury visits the property. The trial judge must accompany the jurors to the property, and any statements by the trial judge must be on the record.

See APJI 1.26, Instruction Before Jury Visits Scene.

References

Ala. Code § 18-1A-191 (1975) (West's Alabama Code).

West's Key Number Digest, Eminent Domain ⇨220.

William A. Schroder & Jerome A. Hoffman, Schroeder and Hoffman on Alabama Evidence § 12:28 (3d ed. 2013, Joseph J. Lester update).

I Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 208.03 (6th ed. 2009).

Jenelle Mims Marsh, Alabama Law of Damages § 16:52 (6th ed. 2012).

Am. Jur. 2d, Eminent Domain §§ 495 to 497.

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Evidentiary effect of view by jury in condemnation proceedings, 1 A.L.R.3d 1397.

Right to view by jury in condemnation case, 77 A.L.R.2d 548.

APJI 14.25 INTEREST [PL]

The Committee recommends no jury instruction on interest.

Notes on Use

Interest is calculated under Ala. Code § 18-1A-211 (1975) (West's Alabama Code).

The Committee suggests the Court request the parties agree to a stated interest rate. The parties can agree that the trial judge will compute the amount of interest.

References

Ala. Code § 18-1A-211 (1975) (West's Alabama Code) states:

(a) Except as provided in subsection (b), the judgment shall include interest at a rate equal to the most recent weekly average one-year constant maturity yield, as published by the Board of Governors of the Federal Reserve System, upon the unpaid portion of the compensation awarded. The interest shall commence to accrue on the date of entry of the judgment.

(b) Except as provided by Section 18-1A-111, the judgment may not include any interest upon the amount represented by funds deposited into probate court by the plaintiff for the period after the date of deposit.

Samford University v. City of Homewood, 959 So. 2d 64 (Ala. 2006), reh'g denied (Ala. Dec. 8, 2006).

Williams v. Alabama Power Co., 730 So. 2d 172 (Ala. 1999), overruled “to the extent that [Williams] conflicts with §§ 18-1A-111 and 18-1A-211 in the context of deposited funds,” *Ex parte Marble City Plaza, Inc.*, 989 So. 2d 1065, 1071 (Ala. 2007). Ala. Code § 18-1A-211 (1975) (West's Alabama Code) does not apply in a case involving a delayed-payment condemnation. In those cases the trial court must determine the proper rate of prejudgment interest to be applied during the period from the date of taking to the date of judgment.

West Key Number Digest, Eminent Domain ☞247.

Jenelle Mims Marsh, *Alabama Law of Damages* § 16:33 (6th

ed. 2012).

Chapter 15

Evidence and Witnesses [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 15.00 The Evidence—Direct—Circumstantial [PL]
- APJI 15.01 Inference [PL]
- APJI 15.02 Credibility [PL]
- APJI 15.03 Deposition—Defined—Use [PL]
- APJI 15.04 Interrogatories—Defined—Use [PL]
- APJI 15.05 Lay Witness's Opinion—Weight [PL]
- APJI 15.06 Expert Witness—Defined—Weight of the Testimony [PL]
- APJI 15.07 Expert Witness—Hypothetical Question [PL]
- APJI 15.08 Limited Purpose Evidence [PL]
- APJI 15.09 Limited Party Evidence [PL]
- APJI 15.10 Impeachment—Conviction of a Crime—Felony/Dishonesty [PL]
- APJI 15.11 Spoliation of Evidence by Plaintiff [PL]
- APJI 15.12 Spoliation of Evidence by Defendant [PL]
- APJI 15.13 Spoliation—Tort Claim [PL]
- APJI 15.14 Willful False Testimony [PL]
- APJI 15.15 Judicial Notice [PL]
- APJI 15.16 Learned Treatises, Periodicals and Pamphlets [PL]
- APJI 15.17 Privilege Claimed by Party [PL]
- APJI 15.18 Privilege Claimed by Non-Party [PL]
- APJI 15.19 Oath to Interpreter for the Speech/Hearing Impaired [PL]
- APJI 15.20 Oath to Foreign Language Interpreter [PL]
- APJI 15.21 Interpreter—Duty and Function [PL]
- APJI 15.22 Writing—Proof [PL]
- APJI 15.23 to 15.29 Reserved
- APJI 15.30 Conclusive or Irrebuttable Presumption [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

APJI 15.31 Rebuttable Presumption Shifting the Burden of
Going Forward with Evidence [PL]

APJI 15.32 Rebuttable Presumption Shifting the Burden of
Proof [PL]

Title of Instruction	Date Approved	Prior Instruction Number
APJI 15.00 The Evidence—Direct— Circumstantial	8/9/13	
APJI 15.01 Inference	8/9/13	15.00, 15.01
APJI 15.02 Credibility	8/9/13	15.02
APJI 15.03 Deposition—Defined— Use	8/9/13	15.03
APJI 15.04 Interrogatories— Defined—Use	8/9/13	15.04, 15.05
APJI 15.05 Lay Witness Opinion— Weight	8/9/13	15.06
APJI 15.06 Expert Witness— Defined—Weight of Testimony	8/9/13	15.07, 15.09
APJI 15.07 Expert Witness—Hypo- thetical Question	8/9/13	15.08
APJI 15.08 Limited Purpose Evi- dence	8/9/13	15.10
APJI 15.09 Limited Party Evidence	8/9/13	15.11
APJI 15.10 Impeachment—Convic- tion of a Crime—Felony/Dishonesty	8/9/13	15.12, 15.13
APJI 15.11 Spoliation of Evidence by Plaintiff	8/9/13	15.14
APJI 15.12 Spoliation of Evidence by Defendant	8/9/13	15.15
APJI 15.13 Spoliation—Tort Claim	10/11/13	15.25
APJI 15.14 Willful False Testimony	9/6/13	15.16
APJI 15.15 Judicial Notice	9/6/13	15.17
APJI 15.16 Learned Treatises, Periodicals and Pamphlets	9/6/13	15.26
APJI 15.17 Privilege Claimed by Party	9/6/13	15.27
APJI 15.18 Privilege Claimed by Non-Party	9/6/13	15.28
APJI 15.19 Oath to Interpreter for the Speech/Hearing Impaired	9/6/13	15.21

EVIDENCE AND WITNESSES

Title of Instruction	Date Approved	Prior Instruction Number
APJI 15.20 Oath to Foreign Language Interpreter	9/6/13	15.22
APJI 15.21 Interpreter—Duty and Function	9/6/13	15.23
APJI 15.22 Writing—Proof	9/6/13	15.29
APJI 15.23 to 15.29 Reserved		
APJI 15.30 Conclusive or Irrebuttable Presumption	10/11/13	15.18
APJI 15.31 Rebuttable Presumption Shifting the Burden of Going Forward with Evidence	10/11/13	15.19
APJI 15.32 Rebuttable Presumption Shifting the Burden of Proof	10/11/13	15.20

**APJI 15.00 THE EVIDENCE—DIRECT—
CIRCUMSTANTIAL [PL]**

The evidence in this case is:

The testimony of the witnesses, and it does not make any difference who called the witness,

The exhibits,

(The facts the parties agreed to),

(Any fact(s) that I took judicial notice of and told you are established); and

(Other).

The evidence is not:

The arguments and statements of the lawyers,

My rulings on objections made by the lawyers,

(Any testimony or exhibit that I instructed you to disregard); and,

(Other).

Direct evidence can be testimony of what a witness saw, heard, smelled, or physically felt. Circumstantial evidence is proof of a chain of circumstances that can prove or disprove a fact. The law does not say one is better than the other; it only requires that you find the facts from the evidence.

Approved August 9, 2013

Notes on Use

Trial judges customarily give this instruction. The Committee recommends the trial judge give his or her choice of an illustration of direct and circumstantial evidence. A common one is the witness

who saw the jet plane and the other that saw only the contrail the plane left.

References

Edwards v. State, 139 So. 3d 827, 836-37 (Ala. Crim. App. 2013) (circumstantial evidence entitled to same weight as direct evidence).

Standifer v. Sonic-Williams Motors, LLC, 401 F. Supp. 2d 1205 (N.D. Ala. 2005) (direct evidence proves a fact without an inference or presumption).

Lane v. Ogden Ent., Inc., 13 F. Supp. 2d 1261, 78 Fair Empl. Prac. Cas. (BNA) 843 (M.D. Ala. 1998) (direct evidence).

West's Key Number Digest, Evidence ☞99, 100, 587.

Am. Jur. 2d Evidence §§ 4, 315, 316.

APJI 15.01 INFERENCE [PL]

Sometimes, it is possible to look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to draw reasonable inferences, but an inference must be based on the evidence in the case.

You cannot infer another fact from the inferred fact.

Approved August 9, 2013

Notes on Use

In addition to the facts proved, the jury can draw reasonable inferences from these facts. Use this instruction to explain inference.

Inference is defined many ways, and it was defined in APJI 15.00 (3d ed. 2012) as follows: “An inference of a fact is a conclusion of the existence of a fact not known or proved, which may reasonably arise from facts that are known or proved.” This is a correct statement of law; however, the Committee determined that a simpler and more comprehensible instruction is needed.

References

Black Warrior Elec. Membership Corp. v. McCarter, 153 So. 3d 158 (Ala. 2012). “An inference is a reasonable deduction of fact, unknown or unproven, from a fact that is known or proved.”

Pirtle v. Tucker, 960 So. 2d 620 (Ala. 2006).

Systrends, Inc. v. Group 8760, LLC, 959 So. 2d 1052 (Ala. 2006).

Ex parte Harold L. Martin Distrib. Co., Inc., 769 So. 2d 313 (Ala. 2000).

Khirieh v. State Farm Mut. Auto. Ins. Co., 594 So. 2d 1220 (Ala. 1992).

Turner v. Azalea Box Co., 508 So. 2d 253, Prod. Liab. Rep. (CCH) P 11484 (Ala. 1987).

Roberts v. Carroll, 377 So. 2d 944 (Ala. 1979).

Malone Freight Lines, Inc. v. McCardle, 277 Ala. 100, 167 So. 2d 274 (1964).

Hale v. Kroger Ltd. Partnership I, 28 So. 3d 772 (Ala. Civ. App. 2009).

Springfield Missionary Baptist Church v. Wall, 993 So. 2d 469 (Ala. Civ. App. 2008).

West's Key Number Digest, Evidence ⇌53, 54.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 3:2 (3d ed. 2013). “An inference is a conclusion about a certain past event or condition drawn from circumstantial evidence, that is, drawn circumstantially from evidence of other events or conditions.”

II Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 451.01 (4) (6th ed. 2010). Inference merely means that the trier of fact may infer fact B from proof of fact A.

3 Kevin F. O' Malley, et al., Federal Practice and Instructions: Civil § 104.20 (5th ed. 2000).

Federal Civil Jury Instructions of The Seventh Circuit, Instr. 1.11 (2009 rev.). “In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this ‘inference.’ A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.”

Am. Jur. 2d, Evidence §§ 1, 4, 199.

Ala. R. Evid. 512A (a).

APJI 15.02 CREDIBILITY [PL]

You must decide what facts have been proved in this case. You must determine the credibility of the witnesses. The word credibility means the quality that makes testimony worthy of belief.

To determine the weight to give a witness's testimony you may consider:

1. The witness's demeanor when (he/she) testified.
2. Whether the witness gave straightforward answers to questions or whether (he/she) evaded answering questions.
3. Whether the witness has any interest in the outcome of this case.
4. Whether the witness showed any bias or prejudice for one party or the other.
5. Other.

In addition, you should use the same standards you use in your everyday life when you must decide whether someone is telling the truth. And, examine the testimony based on your own experiences and reach a verdict based on what you find to be true.

Approved August 9, 2013

Notes on Use

Use this instruction either as a part of the orientation or the concluding instruction. If it is used as an orientation instruction it must be modified.

See APJI 1.07, Interest of Witness.

References

Sharrief v. Gerlach, 798 So. 2d 646 (Ala. 2001).

Jones v. Baltazar, 658 So. 2d 420 (Ala. 1995).

Cook v. Sweatt, 282 Ala. 177, 209 So. 2d 891 (1965).

State v. Crawford, 277 Ala. 568, 173 So. 2d 109 (1965). The trier of fact has no absolute right to disregard undisputed evidence of a witness declared competent by statute whether expert or not.

Patton v. Werner Co., 793 So. 2d 817 (Ala. Civ. App. 2001).

Pitts v. Hulsey, 344 So. 2d 175 (Ala. Civ. App. 1977).

Roland v. Krazy Glue, Inc., 342 So. 2d 383 (Ala. Civ. App. 1977). The jury cannot disregard undisputed evidence of the amount of damages.

West's Key Number Digest, Evidence ⇨584(1), 588; Trial ⇨388.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 3:32 p. 218 (3d ed. 2013). “[A] jury does not have an absolute right to ignore proven facts or disregard the undisputed testimony of competent witnesses and substitute its own conclusions, . . .”

I Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 149.01(1) (6th ed. 2010).

Am. Jur. 2d Trial § 629.

Am. Jur. 2d Witnesses § 993.

Black's Law Dictionary, Credibility p. 374 (7th ed. 1999).

Black's Law Dictionary, Credible Evidence p. 577 (7th ed. 1999).

Ala. R. Evid. 616, Impeachment by evidence of bias.

APJI 15.03 DEPOSITION—DEFINED—USE [PL]

A deposition is the testimony of a witness taken before trial. The witness is sworn and the testimony is taken down by a court reporter.

The deposition testimony of (state name of the deponent) has been (read/played by video). You will consider this testimony as if the witness was present and testified in person.

Approved August 9, 2013

Notes on Use

Use this instruction when a witness's deposition has been read or shown by video to the jury. The instruction suggests the use as a witness's testimony; however, when used to impeach a witness the instruction should be modified.

The Committee suggests that the trial judge modify the language and give this instruction during trial before the deposition testimony is used.

References

Ala. R. Civ. P. 32 (a).

Bama's Best Party Sales, Inc. v. Tupperware, U.S., Inc., 723 So. 2d 29 (Ala. 1998).

Century Plaza Co. v. Hibbett Sporting Goods, Inc., 382 So. 2d 7 (Ala. 1980).

Orders v. Turney, 336 So. 2d 1381 (Ala. Civ. App. 1976).

West's Key Number Digest, Evidence ⇨584(2); Trial ⇨388.

Am. Jur. 2d Depositions and Discovery §§ 1, 2.

Susan J. Silvernail, Electronic Evidence: Discovery in the Computer Age, 58 Ala. Law. 176 (1997).

A.L.R. Library

Propriety of state court's grant or denial of application for

pre-action production or inspection of documents, persons, or other evidence, 12 A.L.R.5th 577.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to requests for admission of facts not within his personal knowledge, 20 A.L.R.3d 756.

Party's right to use, as evidence in civil trial, his own testimony given upon interrogatories or depositions taken by opponent, 13 A.L.R.3d 1312.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Availability of writ of prohibition to prevent illegal or unauthorized taking of depositions, 73 A.L.R.2d 1169.

Right to take depositions in perpetual remembrance for use in pending action, where statute does not expressly grant or deny such right, 70 A.L.R.2d 674.

Identity of subject matter or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 A.L.R.2d 494.

Propriety and effect of jury in civil case taking depositions to jury room during deliberations, 57 A.L.R.2d 1011.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

**APJI 15.04 INTERROGATORIES—DEFINED—
USE [PL]**

Interrogatories are written questions by one party to the other party. The questions are answered in writing and the answers are sworn to.

The (name of plaintiff/name of defendant)'s interrogatories and (name of plaintiff/name of defendant)'s sworn answers are in evidence. You should consider the answers just as if (name of party answering) testified to them in court.

Approved August 9, 2013

Notes on Use

Use this instruction when appropriate.

The language must be modified if more than two parties are in the case and the interrogatories and answers are offered against one party. The trial court should instruct which party the answers are used against.

References

Ala. R. Civ. P. 33 (a) and (b). Comm. Cmt. on 1973 Adoption.

Cody v. Louisville & Nashville R. Co., 535 So. 2d 82 (Ala. 1988). Plaintiff read 44 of 55 interrogatories he propounded and their answers to the jury. Defendant read two because, it argued, the answers explained the answers plaintiff read to the jury. This is a first impression case under Ala. R. Civ. P. 33. The Supreme Court held defendant could read interrogatory answers that were “relevant to or explanatory of answers already admitted.” The decision does not explain the relevance of the interrogatories and answers plaintiff read, and it is not cited on this point by any later case.

Chesser v. Williams, 268 Ala. 57, 104 So. 2d 918 (1958). When two defendants are sued, the answers are evidence against only the defendant making the answer.

Cf., Yates v. Christian Benev. Funeral Homes, Inc., 356 So. 2d 135 (Ala. 1978). The answers to interrogatories in a prior case were admissible because they were in the nature of admissions.

Cf., *City of Gulf Shores v. Harbert Int'l*, 608 So. 2d 348 (Ala. 1992). To be admissible, the pleadings in a prior case must be drawn under and with the consent of the party and inconsistent with the position the party takes in the present case.

Cf., *National Sec. Fire and Cas. Co. v. Coshatt*, 690 So. 2d 391 (Ala. Civ. App. 1996), *Crawley, J.*, dissenting. The plaintiffs' answers to interrogatories that conflicted with their trial testimony were admissible as party admissions and created issue of fact.

Cruze v. Davis, 693 So. 2d 514 (Ala. Civ. App. 1997). The plaintiff unsuccessfully argued that a statement in a brief filed on behalf of the building owner in a prior case was substantial evidence of notice of a defect in the entrance to the bathroom and precluded summary judgment for the building owner.

West's Key Number Digest, *Pretrial Procedure* ⇐307.

Ala. R. Evid. 801 (d) (2) (c).

Ally W. Howell, *Alabama Rules of Civil Procedure* § 33.3 (4th ed. 2004).

Jerome A. Hoffman, *Alabama Civil Procedure* §§ 6.5, 6.99 (2d ed. 2001).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* § 6:63 (3d ed. 2013).

II Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 290.01 (5) (6th ed. 2009).

8B Charles Alan Wright, et al., *Federal Practice and Procedure: Civil* 3d § 2180 (3d ed. 2010).

Am. Jur. 2d Depositions and Discovery §§ 116–145.

A.L.R. Library

Propriety of answer to interrogatory merely referring to other documents or sources of information, 96 A.L.R.2d 598.

**APJI 15.05 LAY WITNESS'S OPINION—
WEIGHT [PL]**

(Name of witness) testified to (his/her) opinion about (state the subject of the opinion).

When deciding the facts you are not bound by the opinion. You must give it the weight you believe it deserves, and you will consider the opinion testimony together with the rest of the evidence in this case.

Approved August 9, 2013

Notes on Use

Use this instruction when a lay witness gives opinion testimony. The instruction must be modified when more than one lay witness gives opinion testimony on, perhaps, more than one subject.

“The Advisory Committee’s Notes to Rule 701 specifically contemplate that ‘most, if not all, of [the common-law] exceptions [to the general rule excluding lay opinions] will be recognized under Rule 701.’” *Horton v. Perkins*, 17 So. 3d 235, 240 (Ala. Civ. App. 2009). The Court relied on the Advisory Committee Notes and the common-law exception and held that the property owner could testify to her lay opinion about the value of a mobile home on the property. Thus, the Committee has retained the references to cases decided before the Alabama Rules of Evidence became effective on January 1, 1996 and that appeared in the Alabama Pattern Jury Instructions: Civil 15.06 (3d ed. 2012).

The user may wish to refer to many cases decided by the Alabama Court of Criminal Appeals that discuss Rule 701.

References

Ala. R. Evid. 602, 701.

Ala. Code § 12-21-114 (1975) (West’s Alabama Code) (lay opinion about value of property).

Ex parte Jackson, 68 So. 3d 211, 215 (Ala. 2010) (lay opinion about the identity of shooter improperly admitted).

Little v. Sugg, 243 Ala. 196, 8 So. 2d 866 (1942) (emotions manifested by another).

American Nat'l. Ins. Co. v. Rains, 215 Ala. 378, 110 So. 606 (1926) (appearance of health).

Allen v. Jones, 259 Ala. 98, 65 So. 2d 217 (1953); Woodward Iron Co. v. Spencer, 194 Ala. 285, 69 So. 902 (1915) (mental condition or capacity).

Jack Cole, Inc. v. Walker, 240 Ala. 683, 200 So. 768 (1941) (speed).

Holden v. Edwards Specialties, Inc., 62 So. 3d 1029 (Ala. Civ. App. 2009) (lay opinion testimony that ditch too small to accommodate water coming from retaining pond and that retaining pond defective).

Horton v. Perkins, 17 So. 3d 235 (Ala. Civ. App. 2009) (value of mobile home).

Delmore v. Gonzales, 903 So. 2d 140 (Ala. Civ. App. 2004) (lay opinion testimony about value of personal property).

Musgrove Const., Inc. v. Malley, 912 So. 2d 227 (Ala. Civ. App. 2003) (discusses Rule 701 and proffered testimony about how a worker on a high voltage transmission line was injured and whether he violated company safety rules).

Allen v. Hill, 758 So. 2d 574 (Ala. Civ. App. 1999) (lay opinion testimony that motorist did not stop at stop sign).

West's Key Number Digest, Evidence ◊470–503.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence §§ 7:3 to 7:15 (3d ed. 2013).

I Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 127.01 (1) to (7) (6th ed. 2009).

Ally W. Howell, Alabama Personal Injury and Torts § 14:52 (2012).

Ally W. Howell, Trial Handbook for Alabama Lawyers §§ 23:3 to 23:16 (3d ed. 2007).

Am. Jur. 2d, Evidence §§ 656, 1080.

A.L.R. Library

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases, 15 A.L.R. 5th 119.

Witnesses: child competency statutes, 60 A.L.R.4th 369.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 A.L.R.3d 1203.

Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident, 33 A.L.R.3d 1405.

Taking deposition or serving interrogatories in civil case as waiver of incompetency of witness, 23 A.L.R.3d 389.

Disqualification of judge on ground of being a witness in the case, 22 A.L.R.3d 1198.

Competency of interested witness to testify to signature or handwriting of deceased, 13 A.L.R.3d 404.

**APJI 15.06 EXPERT WITNESS—DEFINED—
WEIGHT OF THE TESTIMONY [PL]**

(Names of expert witness(s)) testified as experts and gave opinions. They are called expert witnesses because they have a specialized knowledge or skill from their education, training or experience.

They were allowed to testify to help you understand the evidence or decide facts.

You consider the expert's testimony together with all other evidence in this case. But, you do not have to accept their opinions and testimony just because they are experts. You determine their credibility just like you determine the credibility of the other witnesses.

Approved August 9, 2013

Notes on Use

The foundation for the instruction is Ala. R. Evid. 702, the Advisory Committee Notes, and Ala. Code § 12-21-160 (a) (1975) (West's Alabama Code). However, if the case is a type that requires expert testimony to establish the plaintiff's case, and the expert testimony is uncontradicted, the jury is bound by the testimony and the instruction must be modified.

The trial court may wish to briefly state the subject the expert testified about or generally state the opinion, e. g., Doctor Smith testified that in his opinion Doctor Brown did, did not, violate the standard of care.

Expert testimony in eminent domain cases, APJI 14.08.

References

Ala. R. Evid. 702 and Advisory Committee Notes.

Ala. Code § 12-21-160 (a) (1975) (West's Alabama Code).

Southern Energy Homes, Inc. v. Washington, 774 So. 2d 505, 40 U.C.C. Rep. Serv. 2d 986 (Ala. 2000).

Calloway v. Lemley, 382 So. 2d 540 (Ala. 1980).

Commonwealth Life Ins. Co. v. Harmon, 228 Ala. 377, 153 So. 755 (1934).

Crawford Johnson & Co. v. Pryor Motor Co., 219 Ala. 108, 121 So. 388 (1929).

Weeks v. Alabama, 580 So. 2d 79 (Ala. Crim. App. 1991).

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence §§ 7:17 to 7:44 (3d ed. 2013).

I Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 127.02 (1)–(8) (6th ed. 2009).

Charles T. McCormick, Law of Evidence §§ 13–32 (1954).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 44.08 (5th ed. 2010).

Ally W. Howell, Alabama Personal Injury and Torts §§ 14:23 to 14:28, 14:51 (2012).

Ally W. Howell, Trial Handbook for Alabama Lawyers §§ 23:17 to 23:36 (3d ed. 2007).

Am. Jur. 2d Expert and Opinion Evidence §§ 1, 3, 5, 22.

Jerome A. Hoffman, The Alabama Rules of Evidence: Their First Half-Dozen Years, 54 Ala. L. Rev. 241 (2002).

J. Russell McElroy and Claude B. Hughes, Expert Testimony, 31 The Ala. Law. 489 (1969).

Edward F. Dragan, Litigation in Schools: How an Education Expert Can Benefit Your Case, 23 Am. J. Trial Advoc. 197 (1999).

Edward J. Imwinkelried, The Escape Hatches from Frye and Daubert: Sometimes You Don't Need to Lay Either Foundation in Order to Introduce Expert Testimony!, 23 Am. J. Trial Advoc. 1 (1999).

Thomas R. Ireland, Improving the Objectivity of Economic Expert Testimony for Personal Injury/Wrongful Death Litigation, 9 J. Legal Econ. 33 (1999).

Robert P. Murrian, The Admissibility of Expert Eyewitness Testimony under the Federal Rules, 29 Cumb. L. Rev. 379 (1999).

Steven E. Pegalis, *Medical Malpractice: The Art of Advocacy When Engaging in the "Battle of the Experts"*, Steven E. Pegalis, 23 Am. J. Trial Advoc. 259 (1999).

J. Anthony McLain, *Payment of Expert and Lay Witnesses*, 59 Ala. Law. 55 (1998).

Amina Memon and Daniel N. Shuman, *Juror Perception of Experts in Civil Disputes: The Role of Race and Gender*, 22 Law & Psychol. Rev. 179 (1998).

W. Wade Gafford, *Qualifications of Experts in Valuing Economic Damages in Personal Injury and Wrongful Death Cases*, 7 J. Legal Econ. 59 (1997).

James C. Peterson, *Selecting and Using Expert Witnesses in Bad Faith Cases*, 19 Am. J. Trial Advoc. 543 (1996).

Sanjeev Phukan and L.E. Johnson, *Information Systems Ethics and Civil Litigation: A New Role for the Economic Expert*, 6 J. Legal Econ. 39 (1996).

A.L.R. Library

Compelling testimony of opponent's expert in state court, 66 A.L.R.4th 213.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence, 38 A.L.R.3d 812.

Malpractice testimony: Competency of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality, 37 A.L.R.3d 420.

Locality rule as governing hospital's standard of care to patient and expert's competency to testify thereto, 36 A.L.R.3d 440.

Trial court's appointment, in civil case, of expert witness, 95 A.L.R.2d 390.

Right to elicit expert testimony from adverse party called as witness, 88 A.L.R.2d 1186.

Propriety and effect of instructions in civil case on the weight or reliability of medical expert testimony, 86 A.L.R.2d 1038.

APJI 15.06**ALABAMA PATTERN JURY INSTRUCTIONS**

Exclusion from courtroom of expert witnesses during taking of testimony in civil case, 85 A.L.R.2d 478.

Testing qualifications of expert witness, other than handwriting expert, by objective tests or experiments, 78 A.L.R.2d 1281.

Compelling expert to testify, 77 A.L.R.2d 1182.

**APJI 15.07 EXPERT WITNESS—
HYPOTHETICAL QUESTION [PL]**

The expert was asked to give (his/her) opinion based on assumed facts. This is called a hypothetical question.

The weight you give this opinion depends on whether you determine the assumed facts are true.

Approved August 9, 2013

References

Ala. R. Evid 703.

Tillis Trucking Co., Inc. v. Moses, 748 So. 2d 874 (Ala. 1999).

State Farm Fire and Cas. Co. v. Sawyer, 522 So. 2d 248 (Ala. 1988).

Lehigh Portland Cement Co. v. Dobbins, 282 Ala. 513, 213 So. 2d 246 (1968).

Jones v. Keith, 223 Ala. 36, 134 So. 630 (1931).

West's Key Number Digest, Evidence ☞551, 552.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 7:34 (3d ed. 2013).

I Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 127.02 (5), (8) (6th ed. 2009).

Am. Jur. 2d Expert and Opinion Evidence §§ 53 to 76.

Am. Jur. 2d Witnesses §§ 710, 713.

A.L.R. Library

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire as to how they would decide issues of case, 99 A.L.R.2d 7.

Propriety of hypothetical question to expert witness on cross-examination, 71 A.L.R.2d 6.

APJI 15.07**ALABAMA PATTERN JURY INSTRUCTIONS**

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question, 64 A.L.R.2d 1056.

**APJI 15.08 LIMITED PURPOSE EVIDENCE
[PL]**

Some of the evidence in this case is admitted for a limited purpose. The evidence (describe the evidence) is admitted only for (describe the purpose). You cannot consider it (describe what it cannot be used for).

You will consider this evidence with the rest of the evidence, but only for the purpose it was admitted.

Approved August 9, 2013

Notes on Use

Use this instruction when requested. Ala. R. Evid. 105. Alabama law does not require the trial court give a prohibitory limiting instruction. See, *Winner Int'l Corp v Common Sense, Inc*, 863 So 2d 1088 (Ala 2003) (although not required, the court suggested the trial court and lawyers should consider a two part limiting instruction, i.e., what the permissible uses of the evidence are and are not). See, I Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 12.01 (4) (b) (6th ed. 2009) (discussion of the two-part instruction).

The treatises discuss when the trial judge should give a limiting instruction. *McElroy* § 12.01 (4) (a) n. 4; 21A Wright and Miller's *Federal Practice and Procedure*, Evidence § 5066.

See APJI 15.09, Limited Party Evidence.

References

Ala. R. Evid. 105.

Winner Int'l Corp. v. Common Sense, Inc., 863 So. 2d 1088 (Ala. 2003).

Cups Coal Co., Inc. v. Tennessee River Pulp & Paper Co., 519 So. 2d 932, 936 (Ala. 1988).

Barnes v. State ex rel. Ferguson, 274 Ala. 705, 151 So. 2d 619 (1963).

Sims v. Struthers, 267 Ala. 80, 100 So. 2d 23 (1957).

See, *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 7 Fed. R. Evid. Serv. 725 (5th Cir. 1980) (generally a limiting instruction is more effective if given at the time the evidence is admitted).

West's Key Number Digest, Evidence ⌘114; Trial ⌘54(1), 207.

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 1:40, 1:41 (3d ed. 2013).

I Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* §§ 12.01 (1) to (4) (6th ed. 2009).

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 44.06 [1] to [6] (5th ed. 2010).

21A Charles Alan Wright, et al., *Federal Practice & Procedure* § 5066 (2d ed. 2009).

Am. Jur. 2d Evidence §§ 319 to 325.

Charles W. Gamble & Gwen L. Windle, *Subsequent Remedial Measures Doctrine in Alabama: From Exclusion to Admissibility and the Death of Policy*, 37 Ala. L. Rev. 547 (1986).

APJI 15.09 LIMITED PARTY EVIDENCE [PL]

Some of the evidence in this case (describe the evidence) is admitted against only (name party). It is not admitted against (name other party).

You will consider this evidence with the rest of the evidence, but only against (name of party).

Approved August 9, 2013

Notes on Use

Use this instruction when requested. Ala. R. Evid. 105.

The Committee notes that the trial judge gave a limited party instruction before the witness was examined and in the final instructions in *Rice v. Blackmon*, 559 So. 2d 1070, 1071 (Ala. 1990).

See APJI 15.08, Notes on Use.

References

Vaughan v. Oliver, 822 So. 2d 1163, 1173 (Ala. 2001).

Volkswagen of America, Inc. v. Marinelli, 628 So. 2d 378, Prod. Liab. Rep. (CCH) P 13772 (Ala. 1993).

Rice v. Blackmon, 559 So. 2d 1070 (Ala. 1990).

Mason v. New, 475 So. 2d 854 (Ala. 1985).

West's Key Number Digest, Trial ¶54 (1).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* § 1:40 (3d ed. 2013).

I Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 12.01 (3), (4) (6th ed. 2009).

Am. Jur. 2d Evidence § 321.

**APJI 15.10 IMPEACHMENT—CONVICTION OF
A CRIME—FELONY/ DISHONESTY
[PL]**

Evidence is admitted that (witness's name) has been convicted of (state the crime). You should consider this evidence to determine only (his/her) credibility and the weight you give to (his/her) testimony.

Approved August 9, 2013

Notes on Use

See APJI 15.00, Credibility.

Use this instruction in any case when evidence has been introduced that the witness has been convicted of a crime that may be used to impeach under either prong of Ala. R. Evid. 609(a).

The trial judge determines whether the conviction is admissible. Therefore, the jury need not determine whether the witness has been convicted of the crime. If the witness denies that he or she was convicted, the instruction should be modified to allow the jury to decide the issue, as follows:

If you are reasonably satisfied by the evidence that (name of witness) has been convicted of (state the crime), you should consider the conviction to determine only (his/her) credibility and the weight you give to (his/her) testimony.

References

Ala. R. Evid. 609(a).

Ex parte Byner, 270 So. 3d 1162 (Ala. 2018).

Shoney's, Inc. v. Barnett, 773 So. 2d 1015 (Ala. Civ. App. 1999).

West's Key Number Digest, Witnesses ¶345.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 6:31 to:35 (3d ed. 2013).

1 Charles W. Gamble and Robert J. Goodwin, McElroy's Alabama Evidence § 145.01(8) (6th ed. 2009).

Ally W. Howell, *Alabama Personal Injury and Torts* §§ 14:42 to 14:45 (2012).

Ally W. Howell, *Trial Handbook for Alabama Lawyers* §§ 15:11 to 15:12 (3d ed. 2007).

Terry W. McCarthy, *A Guide to Impeachment in Federal and Alabama State Courts*, 70 Ala. Law 45 (2009).

Jerome A. Hoffman, *The Alabama Rules of Evidence: Their First Half-Dozen Years*, 54 Ala. L. Rev. 241, 304–308 (Fall 2002).

J. Walter Jackson, *Impeachment of a Witness by Prior Convictions Under Alabama Rules of Evidence 609: Everything Remains the Same, or Does It.*, 48 Ala. L. Rev. 253 (Fall 1996).

APJI 15.11 SPOILIATION OF EVIDENCE BY PLAINTIFF [PL]

The doctrine of spoliation of evidence applies when one party attempts to, or does (destroy/conceal/ hide/alter/tamper with) evidence that is favorable to the other party. (It applies to an attempt to influence a witness's testimony).

(Name of defendant) says (name of plaintiff) intentionally (destroyed/hid/concealed/altered/tampered with) (describe the evidence) (attempted to influence (name of witness)'s testimony). If you find (name of plaintiff) did this, you may draw such inferences that you believe are reasonable from the wrongful conduct.

Before you make this inference, you must be reasonably satisfied from the evidence that:

1. (Name of plaintiff) knew that the evidence was important to (name of defendant)'s case; and,
2. (Name of plaintiff) intentionally (destroyed/hid/concealed/altered/tampered with) (describe the evidence).

Approved August 9, 2013

Notes on Use

Use this instruction when a party has submitted evidence from which a jury could reasonably find that an opposing party has attempted to or did destroy, hide, conceal, alter or otherwise tamper with material evidence (including attempts to influence a witness's testimony).

The user is advised to carefully review the case authority on the specific matter involved before giving this instruction.

References

Campbell v. Kennedy, 275 So. 3d 507 (Ala. 2018).

Story v. RAJ Props., Inc., 909 So. 2d 797 (Ala. 2005) (plaintiff sanctioned for spoliation).

Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc., 901 So. 2d 84 (Ala. 2004) (plaintiff sanctioned for spoliation).

Verchot v. General Motors Corp., 812 So. 2d 296 (Ala. 2001) (plaintiff sanctioned for spoliation).

Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166 (Ala. 2000) (plaintiff did not spoliolate evidence and defendant not entitled to new trial on this ground).

Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989) (plaintiff sanctioned for spoliation).

American Life Ins. Co. v. Anderson, 246 Ala. 588, 21 So. 2d 791 (1945) (evidence that plaintiff intimidated a witness admissible).

Chancellor v. White, 34 So. 3d 1270 (Ala. Civ. App. 2008) (summary judgment for defendant on ground that plaintiff spoliated evidence reversed).

Capitol Chevrolet, Inc. v. Smedley, 614 So. 2d 439 (Ala. 1993) (court reversed trial court's refusal to dismiss products liability case where plaintiff's insurer sold van for salvage before it and plaintiff filed suit).

Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991) (court affirmed dismissal of products liability case where plaintiff disposed of product).

Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989) (court affirmed dismissal of products case because plaintiff disposed of product).

Street v. Street, 246 Ala. 683, 22 So. 2d 35 (1945) (proponent's willful failure to produce material evidence in will contest admissible).

Southern Home Ins. Co. of the Carolinas v. Boatwright, 231 Ala. 198, 164 So. 102 (1935) (evidence that plaintiff committed arson in insurance contract case admissible).

Drummond v. Drummond, 212 Ala. 242, 102 So. 112 (1924) (attempt to intimidate witness by a non-party inadmissible absent showing of complicity by party).

West's Key Number Digest, Evidence ⇨78; Trial ⇨211.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 44.07 (5th ed. 2010).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* § 4:18 (3d ed. 2013).

I Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* §§ 190.02 to 190.05(3) (6th ed. 2009).

Ally W. Howell, *Alabama Personal Injury and Torts* §§ 3:41, 12:58, 14:86 (2012).

Ally W. Howell, *Trial Handbook for Alabama Lawyers* § 20:17 (3d ed. 2007).

Steven W. Huang & Robert H. Muriel, *Spoliation of Evidence: Defining the Ethical Boundaries of Destroying Evidence*, 22 *Am. J. Trial Advoc.* 191 (1998).

J. Brian Slaughter, Note, *Spoliation of Evidence: A New Rule of Evidence is the Better Solution*, 18 *Am J. Trial Advoc.* 450 (1994).

David G. Wirtes Jr. & Andrew T. Citrin, *Spoliation of Evidence as Proof of Guilt or Liability*, 14 *Ala. Trial Law. J.* (1994).

Ala. Code § 13A-9-4 (1975) (*West's Alabama Code*).

Ala. Code § 13A-10-129 (1975) (*West's Alabama Code*).

**APJI 15.12 SPOILIATION OF EVIDENCE BY
DEFENDANT [PL]**

The doctrine of spoliation of evidence applies when one party attempts to, or does (destroy/conceal/hide/alter/tamper with) evidence that is favorable to the other party. (It applies to an attempt to influence a witness's testimony).

(Name of plaintiff) says (name of defendant) intentionally (destroyed/hid/concealed/altered/tampered with) (describe the evidence) (attempted to influence (name of witness)'s testimony). If you find (name of defendant) did this, you may draw such inferences that you believe are reasonable from the wrongful conduct.

Before you make this inference, you must be reasonably satisfied from the evidence that:

1. (Name of defendant) knew that the evidence was important to (name of plaintiff)'s case; and,
2. (Name of defendant) intentionally (destroyed/hid/concealed/altered/tampered with) (describe the evidence).

Approved August 9, 2013

Notes on Use

This instruction and APJI 15.11, Spoliation of Evidence by Plaintiff, mirror each other. The same legal principle applies whether the plaintiff or the defendant spoliates evidence.

The instruction should not be confused with a situation when the court imposes sanctions against a party for spoliation or an action against a third party for spoliation. The latter situation is covered in APJI 15.13.

References

Southeast Envtl. Infrastructures, L.L.C. v. Rivers, 12 So. 3d 32 (Ala. 2008) (jury instructed on defendant's spoliation of evidence).

Liberty Nat'l Life Ins. Co. v. Sanders, 792 So. 2d 1069 (Ala. 2000) (jury instructed on defendant's spoliation of evidence).

Christian v. Kenneth Chandler Const. Co., Inc., 658 So. 2d 408 (Ala. 1995) (defendant did not spoliage evidence).

Alabama Power Co. v. Murray, 751 So. 2d 494 (Ala. 1999) (jury instructed on defendant's spoliation of evidence).

Campbell v. Williams, 638 So. 2d 804, 817 (Ala. 1994) (jury instruction about spoliation affirmed when defendant doctor spoliated medical records in medical malpractice case).

Salser v. K.I.W.I., S.A., 591 So. 2d 454 (Ala. 1991) (court affirmed denial of default judgment against defendant for claimed spoliation of motorcycle helmet).

Ex parte Bettis, 549 So. 2d 23 (Ala. 1989) Maddox, J., dissenting (court denied writ of mandamus where trial court denied defendants' motion in limine that lawyers attempted to suppress draft autopsy report).

May v. Moore, 424 So. 2d 596 (Ala. 1982) (court affirmed admission of evidence that defendant doctor attempted to destroy and altered medical records).

McCleery v. McCleery, 200 Ala. 4, 75 So. 316 (1917) (trial court erred when it gave affirmative charge for the plaintiff when the evidence suggested defendant destroyed a deed).

Baker v. Letica Corp., 785 So. 2d 1142 (Ala. Civ. App. 2000) (jury instructed on defendant's spoliation of evidence).

West's Key Number Digest, Evidence ⇨78.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 44.07 (5th ed. 2010).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* § 4:18 (3d ed. 2013).

1 Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* §§ 190.02 to 190.05(3) (6th ed. 2009).

Ally W. Howell, *Alabama Personal Injury and Torts* §§ 3:41, 12:58, 14:86 (2012).

Ally W. Howell, *Trial Handbook for Alabama Lawyers* § 20:17 (3d ed. 2007).

Steven W. Huang & Robert H. Muriel, *Spoliation of Evidence: Defining the Ethical Boundaries of Destroying Evidence*, 22 Am. J. Trial Advoc. 191 (1998).

J. Brian Slaughter, Note, *Spoliation of Evidence: A New Rule of Evidence is the Better Solution*, 18 Am J. Trial Advoc. 450 (1994).

David G. Wirtes Jr. & Andrew T. Citrin, *Spoliation of Evidence as Proof of Guilt or Liability*, 14 Ala. Trial Law. J. (1994).

Ala. Code § 13A-10-129 (1975) (West's Alabama Code).

APJI 15.13 SPOILIATION—TORT CLAIM [PL]

(Name of plaintiff) says (he/she/it) was harmed when (describe the event), and (he/she/it) (intended to sue) (did sue) (name of potential defendant) for the harm.

(Name of plaintiff) further says (name of defendant) (negligently/wantonly/willfully) (destroyed/lost) vital evidence (describe the evidence). Because of this, (name of plaintiff) says (he/she/it) had no chance to win (the/a) lawsuit against (name of third party).

(Name of defendant) denies what (name of plaintiff) says, and (he/she/it) says (state the defendant's position).

To recover damages on this claim, (name of plaintiff) must reasonably satisfy you from the evidence that:

1. (Name of defendant) knew that (name of plaintiff) had sued (name of third party), or (name of defendant) knew (name of plaintiff) might file a lawsuit,

2. (Name of defendant) volunteered to preserve the evidence, or (he/she/it) agreed to preserve the evidence, or (name of person or company) asked (name of defendant) to preserve the evidence and offered to pay (him/her/it) the cost to preserve it,

3. (Name of defendant) (negligently/wantonly/willfully) (destroyed/lost) the evidence; and,

4. The evidence was vital to (name of plaintiff)'s lawsuit. Vital evidence is evidence which, if (destroyed/lost), defeated any chance that (name of plaintiff) could have recovered in a lawsuit against (name of third party).

If (name of plaintiff) does not prove these things, you must find for (name of defendant). If (name of plaintiff) does prove these things you will presume (he/she/it) would have won (his/her/its) lawsuit against (name of third party) if (name of defendant) had not (destroyed/lost) the evidence.

(Name of defendant) must then prove to your reasonable satisfaction that (name of plaintiff) would not have won the lawsuit even if (he/she/it) had the evidence. If (name of defendant does not prove (name of plaintiff) would not have won the lawsuit, you must find for (name of plaintiff) and you will award the amount of compensatory damages that (name of plaintiff) would have recovered in (the/a) lawsuit against (name of third party).

(If you determine that (name of defendant)'s conduct was (wanton/willful), you may award punitive damages against (name of defendant)).

Approved September 6, 2013

Notes on Use

Smith v. Atkinson, 771 So. 2d 429 (Ala. 2000) recognized the cause of action against a third party that spoliates evidence that is vital to a plaintiff's claim against another. The action does not exist against the defendant or putative defendant in the underlying claim.

Use APJI 28.01, 29.00 and 29.01 to define negligent, wanton, and willful conduct. Causation is included in element number 4 of the instruction.

References

Imperial Aluminum-Scottsboro, LLC v. Taylor, 295 So. 3d 51 (Ala. 2019).

Killings v. Enterprise Leasing Co., Inc., 9 So. 3d 1216 (Ala. 2008).

Brown Electro Mechanical Sys., Inc. v. Thompson Engineering, Inc., 848 So. 2d 238 (Ala. 2002).

Smith v. Atkinson, 771 So. 2d 429 (Ala. 2000).

Gomillion v. Allstate Indem. Co., 2012 WL 3230672 (M.D. Ala. 2012) (not published in F. Supp. 2d).

West's Key Number Digest, Torts ⌘303, 304, 316; Damages ⌘115; Products Liability ⌘94.1, 94.4, 91.5 (3), 358.

2 Ally Windsor Howell, Alabama Personal Injury & Torts § 10:33 (2013 ed.).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 44.07 [1] (5th ed. 2010).

2 Terry A. Moore, Alabama Workers' Compensation §§ 20:28, 20:29, 29:50 (2d ed. 1998).

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 3:4 (discussing Ala. R. Evid. 301).

1 Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 190.02 to 190.05(3) (6th ed. 2009).

5 Lewis S. Mike Eidson, Litigating Tort Cases § 58:15.

Am. Jur. 2d Evidence § 256.

Am. Jur. 2d Negligence §§ 104, 193, 218, 234.

Am. Jur. 2d Trial § 1100.

Brian A. Warloick, *Smith v. Atkinson*: The Supreme Court of Alabama Holds that Liability can be Imposed on a Third Party for Negligent Spoliation of Evidence, 62 Ala. Law. 201 (May 2001).

APJI 15.14 WILLFUL FALSE TESTIMONY [PL]

If you find that any witness willfully testified falsely about any material fact, you may disregard all or any part of the witness's testimony.

Approved October 11, 2013

Notes on Use

Use this instruction only if there is evidence that a witness willfully gave false testimony. This is not a generic instruction, and trial courts should not give it as a matter of routine.

The appellate decisions give little guidance about what is the trigger for the instruction. It can generally be said that mere contradiction does not justify the instruction, and the fact that a witness's testimony is impeached may not justify the instruction. Additionally, the trial judge must determine whether to direct the instruction to the witness being attacked. If the trial judge does so, he or she may violate the time honored principle that the trial judge should not give the jury any indication about how he or she views a witness's testimony.

The Supreme Court of Alabama has long urged caution about giving this instruction. *Beavers v. Boykin*, 273 Ala. 413, 415, 142 So. 2d 10 (1962). The Court stated:

“[Courts should use] caution in the application of the maxim ‘*falsus in uno, falsus in omnibus*’. The prevailing attitude of the courts toward such instructions is ‘one of tolerance and sufferance. The instructions labor under faint praise and are generally regarded as of little assistance to the juries.’” (internal citation and citation omitted).

The instruction is rewritten to conform to *Flint Const. Co. v. Hall*, 904 So. 2d 236, 250, 22 I.E.R. Cas. (BNA) 296 (Ala. 2004).

References

Flint Const. Co. v. Hall, 904 So. 2d 236, 250, 22 I.E.R. Cas. (BNA) 296 (Ala. 2004).

See, *Cochran v. Cochran*, 5 So. 3d 1220 (Ala. 2008) (bench trial).

APJI 15.14

ALABAMA PATTERN JURY INSTRUCTIONS

West's Key Number Digest, Witnesses ⇨317(2).

Summers v. Summers, 58 So. 3d 184, 188 (Ala. Civ. App. 2010) (bench trial).

See, Alabama State Personnel Bd. v. Dueitt, 50 So. 3d 480, 484 (Ala. Civ. App. 2010) (appeal from trial court's judgment that reversed decision of administrative law judge).

Cf, Ex parte A.M.B., 4 So. 3d 472 (Ala. 2008) (writ of certiorari quashed).

See, Employers Ins. Co. of Alabama v. Cross, 284 Ala. 505, 226 So. 2d 161 (1969) (old rule).

West's Key Number Digest, Trial ⇨210(3), 236(2); Witnesses 317 (1), (2), (3).

Am. Jur. 2d Trial § 1195.

Am. Jur. 2d Witnesses § 1008.

A.L.R. Library

Modern view as to propriety and correctness of instructions referable to maxim "falsus in uno, falsus in omnibus", 4 A.L.R.2d 1077.

APJI 15.15 JUDICIAL NOTICE [PL]

The rules of evidence permit me to accept facts that I find cannot reasonably be disputed. This is called judicial notice. I take judicial notice (state the fact(s)). Even though no evidence has been introduced to prove this fact, you must conclusively accept this fact as proved.

Approved September 6, 2013

Notes on Use

A court is empowered to take judicial notice of facts which are not subject to reasonable dispute. These are facts that are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Ala. R. Evid. 201. The trial judge cannot take judicial notice of a fact that might be disputed by competent evidence. *Westwind Techs., Inc. v. Jones*, 925 So. 2d 166, 23 I.E.R. Cas. (BNA) 875 (Ala. 2005).

The trial judge cannot admit evidence to disprove the facts that have been judicially noticed. Ala. R. Evid. 201 (g) and advisory committee's notes.

References

Ala. R. Evid. 201 and advisory committee's notes.

Westwind Techs., Inc. v. Jones, 925 So. 2d 166, 23 I.E.R. Cas. (BNA) 875 (Ala. 2005).

Phillips v. Sentinel Consumer Products, Inc., 945 So. 2d 450, 21 I.E.R. Cas. (BNA) 1499 (Ala. Civ. App. 2004).

West's Key Number Digest, Evidence ¶1 to 52.

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 2:1 to 2:42 (3d ed. 2013).

II Charles W. Gamble & Robert J. Coleman, *McElroy's Alabama Evidence* §§ 480.01 to 484.02(2) (6th ed. 2009).

Am. Jur. 2d Evidence §§ 24 to 170.

Fed. R. Evid. 201.

APJI 15.15**ALABAMA PATTERN JURY INSTRUCTIONS**

Ally W. Howell, Alabama Personal Injury and Torts § 14:47 (2012).

Ally W. Howell, Trial Handbook for Alabama Lawyers §§ 18:1 to 18:17 (3d ed. 2007).

**APJI 15.16 LEARNED TREATISES,
PERIODICALS AND PAMPHLETS
[PL]**

Expert witnesses have testified to or about statements in published treatises, periodicals or pamphlets about (history/medicine/identify the science or art). The lawyers have used them when questioning the expert witnesses.

You may consider the statements along with all the other evidence material to the issues in this case. The rules of evidence allow the expert witnesses to testify about and read them into evidence, but the rules do not allow the statements to be put in as an exhibit.

Approved September 6, 2013

Notes on Use

Use this instruction when counsel utilizes learned treatises, periodicals, or pamphlets on the subject of history, medicine, or other science or art.

References

Ala. R. Evid. 803 (10).

Hrynkiw v. Trammell, 96 So. 3d 794, 807–810 (Ala. 2012).

Ozment v. Wilkerson, 646 So. 2d 4 (Ala. 1994).

Alabama Power Co. v. Brooks, 479 So. 2d 1169, 1175–1176 (Ala. 1985).

West's Key Number Digest, Evidence ☞157.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence §§ 8:72, 8:73 (3d ed. 2013).

II Charles W. Gamble & William J Goodwin, McElroy's Alabama Evidence § 258.01 to.01(6) (6th ed. 2009).

Ally W. Howell, Alabama Personal Injury and Torts §§ 3:41, 12:58, 14:86 (2012).

APJI 15.16**ALABAMA PATTERN JURY INSTRUCTIONS**

Ally W. Howell, Trial Handbook for Alabama Lawyers § 20:17
(3d ed. 2007).

**APJI 15.17 PRIVILEGE CLAIMED BY PARTY
[PL]**

(Name of plaintiff or defendant) claimed (state the privilege). You may, but are not required to, consider this against the party claiming the privilege.

Approved September 6, 2013

Notes on Use

Use this instruction when a party claims a privilege. Neither the trial judge nor lawyer can comment when a nonparty witness claims a privilege.

If a nonparty witness claims a privilege, any party against whom the jury might draw an adverse inference is entitled, upon request, to an instruction that no adverse inference against that party may be drawn from the nonparty witness's claim of a privilege. See APJI 15.18.

References

Ala. R. Evid. 512A (a).

Privileges generally, Ala. R. Evid. 501 and Advisory Committee's Notes.

Waiver of Privilege, Ala. R. Evid. 510.

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* § 5:30 (3d ed. 2013).

II Charles W. Gamble & Robert J. Coleman, *McElroy's Alabama Evidence* § 421.01 (2) (a), (b), (c) (6th ed. 2009).

Ally W. Howell, *Trial Handbook for Alabama Lawyers* § 17:1 (3d ed. 2007).

APJI 15.18 PRIVILEGE CLAIMED BY NON-PARTY [PL]

A witness in this case claimed (state the privilege). Although you may consider that claim of privilege in determining the credibility of that witness, you may not consider it against any party to this action.

Approved September 6, 2013

Notes on Use

Use this instruction when appropriate and when requested by a party. Ala. R. Evid. 512A (b), 512 (c).

A nonparty witness should be allowed, to the extent possible, to make the claim of privilege without the jury's knowledge. Ala. R. Evid. 512 (b).

References

Ala. R. Evid. 512A (b), 512 (c), and Advisory Committee Comments.

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* § 5:30 (3d ed. 2013).

II Charles W. Gamble & Robert J. Coleman, *McElroy's Alabama Evidence* § 421.02 (2) (d) (6th ed. 2009).

Ally W. Howell, *Trial Handbook for Alabama Lawyers* § 17:1 (2012).

**APJI 15.19 OATH TO INTERPRETER FOR THE
SPEECH/HEARING IMPAIRED [PL]**

Do you solemnly swear (affirm) that you will, to the best of your skill and judgment, make an accurate, clear, and complete interpretation of all court proceeding into sign language, the language which ____ speaks and understands; and that you will make an accurate, clear, and complete interpretation of the witness's statements for the court into the English language (so help you God).

Approved September 6, 2013

Notes on Use

This instruction substantially follows the interpreter oath required of interpreters and published on the Alabama Judicial System Web Site at <http://judicial.alabama.gov/index.cfm>. Additionally, it borrows from the oath stated in the Alabama Judicial System Policies and Procedures for Foreign Language Interpreters § 3.5 (September 2008) (hereinafter, Policy) and the oath suggested in I Charles W. Gamble & William J. Coleman, McElroy's Alabama Evidence § 125.01 (6th ed. 2009). The interpreter's oath can be accessed at <http://forms.alacourt.gov/Interpreter%20Forms/OA7>. The Policy is under revision by the Administrative Office of Courts, and the oath stated in § 3.5 differs from the oath on the website.

Before administering the above oath, the interpreter should be given the same oath administered to all witnesses. Ala. R. Evid. 603. This oath is administered for three purposes. First, the interpreter is a witness. Second, the court must examine the interpreter to determine his or her qualifications as an expert witness. Third, assuming the interpreter is otherwise qualified, the trial judge and the lawyers can question the interpreter about any possible interest, bias, relationship, or other matters that might affect the interpreter's testimony.

Unless the lawyers agree the interpreter is qualified, the trial judge must determine whether the interpreter is qualified as an expert witness interpreter.

References

Birmingham Ry., Light & Power Co. v. Jung, 161 Ala. 461, 49

So. 434 (1909). An interpreter is a witness for the purpose of interpreting.

Ala. R. Civ. P. 43 (f). The rule supersedes Ala. Code § 12-21-130 (1975) (West's Alabama Code) in civil cases.

West's Key Number Digest, Witnesses ⇨45(1), 230, 546.

Ala. R. Evid. 603, 604, 702.

Alabama Administrative Office of Courts Policy on Interpreters (October 1, 2008).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 6:13, 6:14 (3d ed. 2013).

1 Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* 125.01 (6th ed. 2009).

See, Ala. Code § 12-21-131 (1975) (West's Alabama Code) (Interpreters for persons defective in speech and/or hearing) (superseded by A. R. Civ. P. 43 (f)).

See, Ala. Code § 12-21-131(i) (1975) (West's Alabama Code) (Interpreter's Oath) (superseded by A. R. Civ. P. 43 (f)).

**APJI 15.20 OATH TO FOREIGN LANGUAGE
INTERPRETER [PL]**

Do you solemnly (swear) (affirm) that you will, to the best of your skill and judgment, make an accurate, clear, and complete interpretation of all court proceedings into (state the foreign language), the language which ____ speaks and understands; and that you will make an accurate, clear, and complete interpretation of the witness's statements for the court into the English language (so help you God).

Approved September 6, 2013

Notes on Use

This instruction substantially follows the interpreter oath required of interpreters and published on the Alabama Judicial System Web Site at <http://judicial.alabama.gov/index.cfm>. Additionally, it borrows from the oath stated in the Alabama Judicial System Policies and Procedures for Foreign Language Interpreters § 3.5 (September 2008) (hereinafter, Policy) and I Charles W. Gamble & William J. Coleman, McElroy's Alabama Evidence § 125.01 (6th ed. 2009). One interpreter's oath can be accessed at <http://forms.alacourt.gov/Interpreter%20Forms/OA7>. The Policy is under revision by the Administrative Office of Courts, and the oath stated in § 3.5 differs from the oath on the website.

Ala. R. Civ. P. 43 (f) governs appointment of interpreters in civil actions. Therefore, it is uncertain whether the Policy impacts the appointment of a foreign language interpreter in a civil action. However, it may be a best practice that the trial judge, in addition to giving the oath required by Ala. R. Evid. 603 and the oath suggested in this instruction, require the interpreter to sign an oath. A form is suggested in the references.

The Alabama Conduct and Ethics for a Foreign Language Interpreter is accessed at <http://www.alacourt.gov/Sections/Legal/Ethics.aspx>.

Before administering the above oath, the interpreter should be given the same oath administered to all witnesses, Ala. R. Evid. 603. This oath is administered for three purposes. First, the interpreter is a witness. Second, the court must examine the interpreter to determine his or her qualifications as an expert

witness. Third, assuming the interpreter is otherwise qualified, the trial judge and the lawyers can question the interpreter about any possible interest, bias, relationship, or other matters that might affect the interpreter's testimony.

Unless the lawyers agree the interpreter is qualified, the trial judge must determine whether the interpreter is qualified as an expert witness interpreter.

The Policy states a Code of Conduct and Ethics of Foreign Language Interpreters. Policy § 4. Existing Alabama law does not require that the interpreter be the "least interested person available." *McCall v. State*, 833 So. 2d 673, 674–675 (Ala. Crim. App. 2001).

Existing law does not require that the interpreter appointed by the court be registered with the Unified Judicial System or certified. *Albarran v. State*, 96 So. 3d 131 (Ala. Crim. App. 2011).

References

Ala. R. Civ. P. 43 (f).

Ala. R. Evid. 602, 603, 702.

Lam Luong v. State, 199 So. 3d 98, 131-33 (Ala. Crim. App. 2013), rev'd, *Luong v. State*, 199 So. 3d 139 (Ala. 2014).

Birmingham Ry., Light & Power Co. v. Jung, 161 Ala. 461, 49 So. 434 (1909). An interpreter is a witness for the purpose of interpreting.

West's Key Number Digest, Witnesses ⇨230.

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 6:13, 6:14 (3d ed. 2013).

1 Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* 125.01 (6th ed. 2009).

Suggested form of written oath:

I, _____, solemnly (swear) (affirm) that I will, to the best of my skill and judgment, make an accurate, clear, and complete interpretation of all court proceedings into (state the foreign language), the language which _____ speaks and

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understands; and that I will make an accurate, clear, and complete interpretation of the witness's statements for the court into the English language, (so help me God).

Signed this _____ day of _____, 20__.

Name of Interpreter

**APJI 15.21 INTERPRETER—DUTY AND
FUNCTION [PL]**

(Name of interpreter) is an interpreter and will interpret for the court. (Name of witness) (has a hearing and/or speaking impairment) (can neither speak nor understand the English language).

The interpreter has an important role in the trial; however, (name of interpreter) is neither an advocate for the plaintiff or for the defendant and should not be considered by you as such. It is the duty of an interpreter, to the best of (his/ her) skill and judgment, to interpret the questions asked the witness into the language (he/she) understands, and to interpret into English the witness's answers and statements.

The interpreter is also a witness for the purpose of interpreting. Therefore, you will determine (his/her) credibility just as any other witness.

(Name of interpreter) has taken two oaths. The first is the oath given every witness to tell the truth. The second is the oath to make a clear, accurate, and complete interpretation of all questions, answers, and statements.

Approved September 6, 2013

Notes on Use

Use this instruction to explain the duty and function of the interpreter.

An interpreter can be impeached just as any other witness called to testify. *Todd v. State*, 380 So. 2d 370, 372 (Ala. Crim. App. 1980).

References

Ala. R. Evid. 604.

Todd v. State, 380 So. 2d 370, 372 (Ala. Crim. App. 1980).

Birmingham Ry., Light & Power Co. v. Jung, 161 Ala. 461, 49

So. 434 (1909). An interpreter is a witness for the purpose of interpreting.

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 6:13 (3d ed. 2013).

1 Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 94.01 (4), 125.01 (6th ed. 2009).

APJI 15.22 WRITING—PROOF [PL]

There is an issue in this case about:

(Whether (identify the writing) ever existed)

(Whether (identify the writing) is the original writing)

(Whether (identify the writing) correctly reflects the true contents).

You will determine the issue after you consider all the evidence in this case.

Approved September 6, 2013

Notes on Use

Use this instruction after the trial judge has determined that the proponent of a writing has produced enough evidence to admit the document and allow the jury to determine whether the writing “is what it purports to be.” William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* § 9.1 (3d ed. 2013). See, *Ala. R. Evid.* 901(a). In short, use it only after the trial judge ruled that secondary evidence of the original’s content is admissible.

The trial judge should instruct only on the applicable issue or issues.

The instruction is based on *Ala. R. Evid.* 1008.

References

Ala. R. Evid. 1008 and Advisory Committee’s Notes.

Shaffer v. Regions Fin. Corp., 29 So. 3d 872, 880–881 (Ala. 2009). This case discusses the first issue in APJI 15.22.

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 10:1 to 10:22 (3d ed. 2013).

II Charles W. Gamble & William J. Coleman, *McElroy’s Alabama Evidence* §§ 212.01, 225.01 (1)–(3), 228.01 (1)–(3) (6th ed. 2009).

Ala. R. Evid. 1001(1).

Rule 1001(2) defines “writings” and “original”.

Ala. R. Evid. 1002 states the “original writings rule” (Best Evidence Rule).

A.L.R. Library

Admissibility of evidence to establish oral antenuptial agreement, 81 A.L.R.3d 453.

Oral acceptance of written offer by party sought to be charged as satisfying statute of frauds, 30 A.L.R.2d 972.

Necessity and sufficiency of statement of consideration in contract or memorandum of sale of land, under statute of frauds, 23 A.L.R.2d 164.

Memorandum which will satisfy statute of frauds, as predicable in whole or part upon writings prior to the oral agreement, 1 A.L.R.2d 841 (sec. 5 superseded by Oral acceptance of written offer by party sought to be charged as satisfying statute of frauds, 30 A.L.R.2d 972).

APJI 15.23 to 15.29**Reserved**

**APJI 15.30 CONCLUSIVE OR IRREBUTTABLE
PRESUMPTION [PL]****OMITTED**

Notes on Use

The Committee omitted the general instruction in favor of including a specific instruction in a chapter where applicable. See second paragraph APJI 15.18 (3d ed. 2012) for the general instruction.

A presumption is a legal rule based upon experience or public policy and established in law to help the jury decide the case. It provides a legally recognized connection between a proven fact or facts and a presumed fact. The first may be called the basic fact or facts and the second called the presumed fact. If “Fact A” (the basic fact or facts) has been proved then the law provides that such proof means “Fact B” (the presumed fact) exists.

A conclusive or irrebuttable presumption is mandatory because the basic fact is the legal equivalent of the presumed fact and no one will be allowed to assert or prove the contrary. Some authorities contend that such a presumption is in fact a rule of substantive law. An instruction on presumption should only be given when there is evidence before the jury from which the presumption can arise. The trial judge may have to further explain and elaborate upon the instruction because of the particular facts of the case or the law governing the particular presumption.

See APJI 28.06 (if trier of fact is reasonably satisfied that a child is under 7 years of age then he or she is conclusively presumed incapable of negligence); APJI 30.04 (child under 7 years of age is conclusively presumed incapable of contributory negligence). Note that the instruction does not use the word “presumption.”

References

Ala. R. Evid. 301(a).

Ala. R. Evid. 301(a) advisory committee’s notes.

Baxter v. State, 41 Ala. App. 533, 143 So. 2d 191 (1962)

(characterizing conclusive presumption as more of a rule of substantive law than procedural; likewise providing that evidence is not admissible to contradict it).

Greer v. Marriott, 27 Ala. App. 108, 167 So. 597 (1936) (one is conclusively presumed to know the statutory rules of the road).

West's Key Number Digest, Evidence ¶53 to 89.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 44.03 (5th ed. 2010).

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence §§ 3:1 to 3:8 (3d ed. 2013).

II Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 451.01(2), 480.01(7)(a) (6th ed. 2009).

Charles W. Gamble & Robert J. Goodwin, Gamble's Alabama Rules of Evidence § 301(a) (1995) ("Conclusive presumptions, not governed by this Rule 301, are those applied when because of certain proven facts the law requires the finder of fact to find another—presumed—fact.").

Am. Jur. 2d Evidence § 201.

**APJI 15.31 REBUTTABLE PRESUMPTION
SHIFTING THE BURDEN OF
GOING FORWARD WITH
EVIDENCE [PL]****OMITTED**

Notes on Use

A presumption that shifts the burden of going forward with the evidence is sometimes referred to as an administrative presumption, and is “created primarily for the purpose of furthering the determination of the particular controversy and . . . [is] based on fairness and convenience.” II Charles W. Gamble & Robert J. Goodwin, *McElroy’s Alabama Evidence* § 451.01(5) (6th ed. 2009). See, William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ 3:1 to 3:8 (3d ed. 2013).

APJI 15.19 (3d ed. 2012) is a correct statement of law. See, *Williams v. Hughes Moving & Storage Co., Inc.*, 578 So. 2d 1281 (Ala. 1991) (stating APJI 26.13 (2d ed. 1993) is a correct statement of law). However, in practice it is a difficult concept for the jury. For this reason, as stated in APJI 26.14 and 26.15, the Committee does not state a “bright-line” rule about how administrative presumptions are applied, the quantum of proof required to rebut, and how trial judges should rule on JML. See APJI 26.14 and 26.15 Notes on Use.

An administrative presumption will arise in many different circumstances, and some are listed in the references.

References

Ala. R. Evid. 301(b) Advisory Committee’s Notes.

Ala. R. Evid. 301(b)(1).

Edwards v. Valentine, 926 So. 2d 315 (Ala. 2005) (negligent entrustment).

Pryor v. Brown & Root USA, Inc., 674 So. 2d 45 (Ala. 1995) (driving employer’s vehicle).

Ex parte Hicks, 537 So. 2d 486 (Ala. 1988) (driving employer’s vehicle and license plate issued to tractor owner).

Letson v. Fram Corp., 413 So. 2d 1085 (Ala. 1982) (when the defendant introduced evidence that the deceased husband had not exercised reasonable care, trial judge correctly refused to give wrongful death widow's requested instruction about the rebuttable presumption that one "in possession of his normal faculties will follow the law of self-preservation and exercise ordinary care for his own personal protection.")

Holmes v. Birmingham Transit Co., 270 Ala. 215, 116 So. 2d 912 (1959) (recognized that in a *res ipsa loquitur* case the presumption merely had the effect of shifting the responsibility to the defendant to go forward with the evidence and once the defendant offers evidence in rebuttal then the presumption is of no further effect).

Dorsey v. Dorsey, 259 Ala. 220, 66 So. 2d 135 (1953) (suit to annul marriage and reform deed).

Gambill v. Cassimus, 247 Ala. 176, 22 So. 2d 909 (1945) (suit to revive dormant judgment).

Sloss-Sheffield Steel & Iron Co. v. Watford, 245 Ala. 425, 17 So. 2d 166 (1944) (suit by purported wife to collect workers compensation death benefits).

Pollard v. Williams, 238 Ala. 391, 191 So. 225 (1939) (train derailment, administrative presumption of negligence).

Vaughan v. Borland, 234 Ala. 414, 175 So. 367 (1937) (suit by creditor, administrative presumption about ownership of property).

City of Mobile v. McClure, 221 Ala. 51, 127 So. 832 (1930) (whether tree was cut down pursuant to city's police power or in exercise of power for construction or enlargement of public works).

APJI 20.03 (rebuttable presumption against suicide); APJI 26.22 (violation of rules of road as basis for presumption of negligence); APJI 26.14 (ownership of a vehicle giving rise to a rebuttable presumption that driver was agent of owner and acting within line and scope of authority); APJI 28.07 (rebuttable presumption that child between 7 and 14 years of age is incapable of negligence); APJI 28.16 (inference of negligence from proof of elements of *res ipsa loquitur*).

West's Key Number Digest, Evidence ☞53 to 89.

Ally W. Howell, *Alabama Personal Injury and Torts* §§ 1:38, 2:3, 12:43, 12:44, 12:48, 14:17, 14:57, 14:58 (2012).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 44.3 (5th ed. 2010) (concluding that *res ipsa loquitur* does not serve in the place of evidence after the defendant introduces proof of contravening negligence).

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence §§ 3:1 to 3:8 (3d ed. 2013).

II Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 451.01(5)(d) (6th ed. 2009) (general discussion of presumptions shifting the burden of going forward with the evidence).

Am. Jur. 2d Evidence §§ 207 to 207, 212, 215.

Jerome A. Hoffman, Thinking About Presumptions: The "Presumption" of Agency from Ownership as Study Specimen, 48 Ala. L. Rev. 885, 888 (1997).

**APJI 15.32 REBUTTABLE PRESUMPTION
SHIFTING THE BURDEN OF
PROOF [PL]****OMITTED**

Notes on Use

As with APJI 15.30, the Committee omitted the general instruction in favor of including a specific instruction in a chapter where applicable. See the second paragraph in APJI 15.20 (3d ed. 2012) for the general instruction.

The user may refer to APJI 15.30 Notes on Use for the definition of presumption. Additionally, the user may draft an instruction that omits the phrase “rebuttable presumption” or “the defendant can rebut the presumption.” See, e.g. APJI 15.13:

If (name of plaintiff) does prove these things you will presume (he/she/it) would have won (his/her/its) lawsuit against (name of third party) if (name of defendant) had not (destroyed/lost) the evidence.

(Name of defendant) must then prove to your reasonable satisfaction that (name of plaintiff) would not have won the lawsuit even if (he/she/it) had the evidence.

References

Ala. R. Evid. 301(b) advisory committee’s notes.

Ala. R. Evid. 301(b)(2).

Smith v. Atkinson, 771 So. 2d 429 (Ala. 2000).

Johnson v. Howard, 279 Ala. 16, 181 So. 2d 85 (1965) (presumption that one has the sound mind and testamentary capacity necessary for the execution of a will causes the burden of proof to reside upon the challenger).

Parker v. Marshall, 549 So. 2d 463, 465 (Ala. 1989) (affirming trial court’s jury charge to the effect that: “If you are reasonably satisfied from the evidence that a confidential relationship existed between the testatrix and Lowery Parker [the beneficiary/proponent exercising the alleged undue influence] at the time of the execution of the will in question and that Lowery Parker

participated directly or indirectly in the preparation of the will or execution of the will in which he is named a beneficiary, a presumption of undue influence rises and, in that event, the burden is upon the proponent to reasonably satisfy you from the evidence that the will in question was not directly or indirectly the product of undue influence on the party of Lowery Parker.”).

More fact-specific instructions concerning this specie of burden-shifting, rebuttable presumption are found elsewhere in the Alabama Pattern Jury Instructions. See, e.g., APJI 38.08 (if the jury is reasonably satisfied that testator suffered from habitual, fixed or permanent insanity then the burden is on proponent to reasonably satisfy jury that the will was executed during a lucid interval); APJI 38.10 (if the jury is reasonably satisfied that a confidential relationship existed between the testator and a person who participated in preparation of the will in which he is named as a beneficiary then a presumption of undue influence rises which shifts the burden to the proponent to reasonably satisfy the jury that the will was not the product of undue influence by such person); APJI 38.15 (rebuttable presumption that there was undue influence, based upon the jury’s being reasonably satisfied that the beneficiary had a dominant confidential relationship with the testator and exercised undue activity or interference in preparation or execution of will, shifts burden of proof upon the proponent to reasonably satisfy the jury that there was no undue influence).

Ally W. Howell, *Alabama Personal Injury and Torts* §§ 1:38, 2:3, 12:43, 12:44, 12:48, 14:17, 14:57, 14:58 (2012).

William A. Schroeder & Jerome A. Hoffman, *Alabama Evidence* §§ (3d ed. 2013).

II Charles W. Gamble & Robert J. Goodwin, *Mc Elroy’s Alabama Evidence* §§ 301, 451.01(5)(c) (6th ed. 2009).

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 44.03 (5th ed. 2010).

Chapter 16

False Imprisonment [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

APJI 16.00 False Imprisonment—Elements [PL]

APJI 16.01 Merchants Protection Statute [PL]

Title of Instruction	Date Approved	Prior Instruction Number
16.00 False Imprisonment—Elements [PL]	1/9/15	16.00, 16.01, 16.02
16.01 Merchants Protection Statute [PL]	9/5/14	New

**APJI 16.00 FALSE IMPRISONMENT—
ELEMENTS [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant/ defendant's employee) falsely imprisoned (name of plaintiff). (Name of plaintiff) says (state the conduct plaintiff says was false imprisonment).

False imprisonment is defined as the unlawful detention of the person of another, for any length of time, whereby (he/she) is deprived of (his/her) personal liberty. To be liable for false imprisonment, (name of defendant/employee) does not have to put (name of plaintiff) in jail or prison. It does not require that (name of plaintiff) be physically kept in a place, it only requires that (he/she) cannot reasonably or practically leave.

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of defendant/employee) unlawfully prevented (name of plaintiff) from going somewhere (he/she) wished to go, or (name of defendant/employee) made (name of plaintiff) go somewhere (he/she) did not wish to go,

2. That (name of defendant/employee)'s conduct was intentional or (he/she) used physical force or threats of physical force or intimidation to detain (name of plaintiff),

3. That (name of plaintiff) was aware that (he/she) (was not free to leave) (could not refuse to go); and,

4. That (name of defendant/employee)'s conduct caused (name of plaintiff) harm.

If (name of plaintiff) proved all these things you must find for (him/her), and then you must determine what amount of money to award (name of plaintiff).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant/employee).

Approved January 9, 2015

Notes on Use

The courts frequently state: “For there to be false imprisonment there must be some direct restraint of the person; however, it is not necessary that there be confinement in a jail or prison. Any exercise of force, or the express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he doesn’t wish to remain, or go where he does not wish to go, is an imprisonment.” E.g., *Crown Cent. Petroleum Corp. v. Williams*, 679 So. 2d 651, 654 (Ala. 1996).

If the evidence shows the plaintiff committed no crime neither probable cause nor good faith are defenses. *Yancey v. Farmer*, 472 So. 2d 990 (Ala. 1985); *Daniels v. Milstead*, 221 Ala. 353, 128 So. 447 (1930). However, the cases conflict on this point. See, *Lindsey By and Through Hodges v. Camelot Music, Inc.*, 628 So. 2d 314 (Ala. 1993) (charge against Lindsey dropped but Court affirmed summary judgment because store manager had probable cause to detain Lindsey). Therefore, the user should refer to the latest authorities to determine if Yancey and Daniels are still good law. If they are, evidence of defendant’s conviction in a lower court, even if later overturned or vacated, is admissible to show probable cause to rebut plaintiff’s claim for punitive damages. *Yancey v. Farmer*, 472 So. 2d 990 (Ala. 1985).

A person acts in bad faith when he or she lacks any reasonable basis upon which to charge another person with a crime. *Crown Cent. Petroleum Corp. v. Williams*, 679 So. 2d 651 (Ala. 1996).

A person does not instigate or cause an arrest if he or she only reported facts to law enforcement and did not tell the officer to arrest the plaintiff. *Lee v. Minute Stop, Inc.*, 874 So. 2d 505 (Ala. 2003); *Crutcher v. Wendy’s of North Alabama, Inc.*, 857 So. 2d 82, 92 (Ala. 2003); *Crown Cent. Petroleum Corp. v. Williams*, 679 So. 2d 651, 654 (Ala. 1996); *Dolgencorp, Inc. v. Pounders*, 912 So. 2d 523 (Ala. Civ. App. 2005). However, the person must accurately and honestly tell the law enforcement authority about all material information.

A claim for false imprisonment will lie if plaintiff is detained after it is determined he or she should have been released. *Upshaw v. McArdle*, 650 So. 2d 875 (Ala. 1994); *Hill v. Wyrosdick*, 216 Ala. 235, 113 So. 49 (1927); *Simpson v. Boyd*, 212 Ala. 14, 101 So. 664 (1924).

A wrongful or false arrest will support a claim for false imprisonment. *Upshaw v. McArdle*, 650 So. 2d 875 (Ala. 1994). See, *Strain v. Irwin*, 195 Ala. 414, 70 So. 734, 763 (1915) (“an illegal arrest is both technically and in fact a false imprisonment.”).

The plaintiff is entitled to nominal damages when the defendant is liable for false imprisonment.

References

Ala. Code § 6-5-170 (1975) (West’s Alabama Code).

Heining v. Abernathy, 295 So. 3d 1032 (Ala. 2019), reh’g denied (2019).

Woodruff v. City of Tuscaloosa, 101 So. 3d 749 (Ala. 2012).

Big B, Inc. v. Cottingham, 634 So. 2d 999 (Ala. 1993), abrogation recognized, *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44 (Ala. 2001).

Crutcher v. Wendy’s of North Alabama, Inc., 857 So. 2d 82 (Ala. 2003).

Crown Cent. Petroleum Corp. v. Williams, 679 So. 2d 651 (Ala. 1996).

Yancey v. Farmer, 472 So. 2d 990 (Ala. 1985).

Whitlow v. Bruno’s, Inc., 567 So. 2d 1235 (Ala. 1990).

Myles v. Screentech, Inc., 98 So. 3d 563 (Ala. Civ. App. 2012).

Dolgencorp, Inc. v. Pounders, 912 So. 2d 523 (Ala. Civ. App. 2005).

West’s Key Number Digest, False Arrest ☞2, 3, 6, 10, 13, 14, 15(2), (3).

1 Michael L Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 27.04 (5th ed. 2010).

Jenelle Mims Marsh, *Alabama Law of Damages* § 36:29 (6th ed. 2012).

W. Page Keeton, et al., *Prosser & Keeton on Torts* § 11 (5th ed. 1984).

Am. Jur. 2d, False Imprisonment §§ 1, et seq.

FALSE IMPRISONMENT

APJI 16.00

Thomas Brad Bishop, Excerpts From the Law of Shoplifting: A Guide for Lawyers and Merchants, 19 Cumb. L. Rev. 43 (1988–1989).

**APJI 16.01 MERCHANTS PROTECTION
STATUTE [PL]**

Ala. Code § 15-10-14 (1975) (West's Alabama Code)

(Name of defendant) says (name of plaintiff) cannot recover because (he/she) was detained under the Merchants Protection Act.

To prove this defense, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of defendant/employee) had probable cause to believe (name of plaintiff) unlawfully took goods that (name of plaintiff) had for sale, and (name of defendant) had probable cause to believe that (he/she/it) could recover the goods if (he/she/it) took (name of plaintiff) into custody;

2. That (name of defendant/employee) took (name of plaintiff) into custody to attempt to recover the goods; and,

3. That (name of defendant/employee) detained (name of plaintiff) in a reasonable manner and for a reasonable time to recover or attempt to recover the goods.

If (name of defendant) proved all these things you must find for (him/her/it).

Probable cause

(Name of defendant/employee) had probable cause if (he/she/it) knew facts that would lead a person of ordinary caution and prudence to believe or have an honest and strong suspicion that (name of plaintiff) was guilty and that the goods could be recovered if (name of plaintiff) was taken into custody and detained.

(Name of defendant/employee)'s knowledge can be based on what (he/she) saw or heard or reliable information given to (him/her) by another person.

Whether (name of defendant) had probable cause is judged in light of the facts as they appeared to (him/her/it) when (he/she/it) took (name of plaintiff) into custody.

Custody

(Name of plaintiff) was in custody if (his/her) freedom was directly controlled and limited.

Approved February 6, 2015

Notes on Use

Commentators refer to Ala. Code § 15-10-14 (1975) (West's Alabama Code) as the Merchants Protection Statute, and the court referred to it as the Shopkeepers Act, *S. S. Kresge Co. v. Ruby*, 348 So. 2d 484, 490 (Ala. 1977). The legislature enacted the Shopkeepers Act in 1957 and it applies to merchants whose business is the retail or wholesale sale of goods. The statute immunizes merchants, their employees, and peace officers from liability for false arrest, false imprisonment or unlawful detention. It does not immunize them for assault and battery.

The purpose of detention is the recovery of the goods. 1 Michael L. Roberts and Gregory S. Cusimano, *Alabama Tort Law* § 27.04 [3] (5th ed. 2010). The treatise states the merchant can “take him into custody and detain him in a reasonable manner for a reasonable length of time (for the purpose of attempting the recovery [of the goods])”. *Id.* 1551.

The Act provides immunity; therefore, it must be pleaded as a defense. See, *Super X Drugs of Alabama, Inc. v. Martz*, 51 Ala. App. 370, 286 So. 2d 47 (Civ. App. 1973) (defendant filed pleas that raised the Act as a defense).

Theft of property and the degrees of theft of property are defined in Ala. Code § 13A-8-1 to 5 (1975) (West's Alabama Code).

References

Ala. Code § 15-10-14 (1975) (West's Alabama Code) states:

- (a) A peace officer, a merchant or a merchant's employee who has probable cause for believing that goods held

for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer, merchant or merchant's employee shall not render such police officer, merchant or merchant's employee criminally or civilly liable for false arrest, false imprisonment or unlawful detention.

- (b) Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments.
- (c) A merchant or a merchant's employee who causes such arrest as provided for in subsection (a) of this section of a person for larceny of goods held for sale shall not be criminally or civilly liable for false arrest or false imprisonment where the merchant or merchant's employee has probable cause for believing that the person arrested committed larceny of goods held for sale.

Dolgencorp, LLC v. Spence, 224 So. 3d 173 (Ala. 2016).

Wesson v. Wal-Mart Stores East, L.P., 38 So. 3d 746 (Ala. Civ. App. 2009).

Chapter 17

Federal Employers' Liability [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 17.00 Introduction to Federal Employers' Liability Act [PL]
- APJI 17.01 FELA—Negligence—Elements—Title 45 U.S.C.A. §§ 51 and 53 [PL]
- APJI 17.02 FELA—Negligence—Definition [PL]
- APJI 17.03 FELA—Duty to Provide Reasonably Safe Place to Work [PL]
- APJI 17.04 FELA—Plaintiff's Contributory Negligence Only Diminishes the Amount of Recovery [PL]
- APJI 17.05 FELA—Contributory Negligence—Diminution of Damages [PL]
- APJI 17.06 FELA—Violation of Federal Locomotive Inspection Act—49 U.S.C. §§ 20701 to 20703 [PL]
- APJI 17.07 FELA—Violation of Federal Safety Appliance Act—49 U.S.C. §§ 20301 to 20306 [PL]
- APJI 17.08 FELA—Corporation Acts Through Its Officers, Servants, and Employees [PL]
- APJI 17.09 to 17.14 Reserved
- APJI 17.15 FELA—Compensatory Damages—Types [PL]
- APJI 17.16 FELA—Personal Injury—Medical Expenses [PL]
- APJI 17.17 FELA—Loss of Future Earnings or Future Earning Capacity [PL]
- APJI 17.18 FELA—Aggravation of Pre-existing Injury or Condition [PL]
- APJI 17.19 FELA—Mitigation of Damages [PL]
- APJI 17.20 FELA—Death Case—Damages [PL]
- APJI 17.21 FELA—Death—Children's Damages for Loss of Care, Etc. [PL]
- APJI 17.22 FELA—Death—Damages After Child's Minority [PL]
- APJI 17.23 FELA—Death—Damages—Conscious Pain and Suffering [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

APJI 17.24 Verdict Form—Contributory Negligence Submitted to Jury [PL]

Chapter 17 Conversion Chart

Title of Instruction	Date Approved	Prior Instruction Number
APJI 17.00 Introduction to Federal Employers' Liability Act [PL]	2/7/14	New
APJI 17.01 FELA—Negligence—Elements—Title 45 U.S.C.A. § § 51 and 53 [PL]	2/7/14	17.01
APJI 17.02 FELA—Negligence—Definition [PL]	1/10/14	New
APJI 17.03 FELA—Duty to Provide Reasonably Safe Place to Work [PL]	2/7/14	17.02
APJI 17.04 FELA—Plaintiff's Contributory Negligence Only Diminishes the Amount of Recovery [PL]	2/7/14	17.05
APJI 17.05 FELA—Contributory Negligence—Diminution of Damages [PL]	2/7/14	17.06
APJI 17.06 FELA—Violation of Federal Locomotive Inspection Act—49 U.S.C. § § 20701 to- 20703 [PL]	2/7/14	17.04
APJI 17.07 FELA—Violation of Federal Safety Appliance Act—49 U.S.C. § § 20301 to- 20306 [PL]	2/7/14	17.03
APJI 17.08 FELA—Corporation Acts Through Its Officers, Servants, and Employees [PL]	3/7/14	17.11
APJI 17.09–17.14—Reserved		
APJI 17.15 FELA—Compensatory Damages—Types [PL]	3/7/14	17.13
APJI 17.16 FELA—Personal Injury—Medical Expenses [PL]	3/7/14	New
APJI 17.17 FELA—Loss of Future Earnings or Future Earning Capacity [PL]	3/7/14	New

FEDERAL EMPLOYERS' LIABILITY

Title of Instruction	Date Approved	Prior Instruction Number
APJI 17.18 FELA—Aggravation of Pre-Existing Injury or Condition [PL]	3/7/14	New
APJI 17.19 FELA—Mitigation of Damages [PL]	3/7/14	17.20, 17.21
APJI 17.20 FELA—Death Case—Damages [PL]	4/11/14	17.15
APJI 17.21 FELA—Death—Children's Damages For Loss of Care, Etc. [PL]	4/11/14	17.16
APJI 17.22 FELA—Death—Damages After Child's Minority [PL]	4/11/14	17.17
APJI 17.23 FELA—Death—Damages—Conscious Pain and Suffering [PL]	4/11/14	17.18
APJI 17.24 FELA—Verdict Form—Contributory Negligence Submitted to Jury [PL]	4/11/14	New

**APJI 17.00 INTRODUCTION TO FEDERAL
EMPLOYERS' LIABILITY ACT [PL]**

The Act applies to railroad carriers and their employees. It allows railroad employees to file claims when injured on-the-job, but it is not a workers' compensation act.

FELA claims can be subject to pre-emption. In *re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Alabama*, on September 22, 1993, 188 F. Supp. 2d 1341, 1349 (S. D. Ala. 1999).

Approved February 7, 2014

**APJI 17.01 FELA—NEGLIGENCE—
ELEMENTS—TITLE 45 U.S.C.A.
§§ 51 AND 53 [PL]**

Plaintiff (name of plaintiff) says (he/she) was defendant's (name of defendant) employee and (he/she) was harmed on the job for (name of defendant). (Name of plaintiff) says (name of defendant)'s conduct caused, in whole or in part, the harm (describe the negligent conduct plaintiff says caused the harm).

(Name of plaintiff) says (name of decedent) was defendant's (name of defendant) employee and (name of decedent) died on the job for (name of defendant). (Name of plaintiff) says (name of defendant)'s conduct caused, in whole or in part, (name of decedent)'s death (describe the negligent conduct plaintiff says caused the death).

(Name of defendant) denies it caused (name of plaintiff/decedent)'s (harm/death). (It further says (plaintiff/decedent contributed to (his/her) (harm/death)) (plaintiff's claim is barred by the statute of limitations) (plaintiff released any claim against (name of defendant)).

To recover on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff/decedent) was (name of defendant)'s employee on the job in the scope of (his/her) employment,
2. (Name of defendant)'s conduct was negligent; and,
3. (Name of defendant)'s conduct caused, in whole or in part, no matter how small, (name of plaintiff/decedent)'s (harm/death).

If (name of plaintiff) proves all these things, you must find for (him/her) and then you must determine what amount of money will reasonably compensate (him/her) for the

(harm/death). If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved February 7, 2014

Notes on Use

Use this instruction with APJI 17.02.

When the first element of instruction is not an issue it should not be given. The trial judge may tell the jury the parties agree the plaintiff was the defendant's employee working on a job that involved interstate commerce.

If the first element is disputed, the user may consider the following instructions.

(Name of plaintiff) was in the course of (his/her) employment if: (he/she) was doing a specifically defined duty; or doing a job that (he/she) was directed to do; or doing something that was, in general, connected to (his/her) job.

The user may wish to review the pattern instruction stated in Kevin F. O'Malley, et al, Federal Jury Practice and Instructions § 155.20 p. 306 (5th ed. 2001) for examples of claims of negligent conduct.

The Committee refers the trial judge and lawyers to 3A Federal Jury Practice and Instructions—Civil (5th ed. 2001, Supp. 2010) Chapter 155, Federal Employers' Liability Act, Federal Safety Appliance Act and Federal Boiler Inspection Act.

References

Title 45 U.S.C.A. § 51 states, among other things:

“Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.”

45 U.S.C.A. §§ 51 to 59 (West 2007).

49 U.S.C.A. §§ 20101, 20102, 20701 (West 2007).

49 U.S.C.A. §§ 20301 to 20304 (West 2007).

CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2635, 180 L. Ed. 2d 637, 32 I.E.R. Cas. (BNA) 609, 2011 A.M.C. 1521 (2011). The instruction at issue stated: “Defendant ‘caused or contributed to’ Plaintiff’s injury if Defendant’s negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that an injury was caused by negligence.’ ”

Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563, 124 L.R.R.M. (BNA) 2953, 106 Lab. Cas. (CCH) P 12214 (1987).

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), reh’g denied, 353 U.S. 943, 1 L. Ed. 2d 764, 77 S. Ct. 808 (1957).

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949).

Erie R. Co. v. Winfield, 244 U.S. 170, 37 S. Ct. 556, 61 L. Ed. 1057 (1917).

Fowler v. Seaboard Coastline R. Co., 638 F.2d 17 (5th Cir. 1981).

CSX Transp., Inc. v. Miller, 46 So. 3d 434 (Ala. 2010).

Glass v. Birmingham Southern R. Co., 905 So. 2d 789 (Ala. 2004).

Brasier v. Norfolk Southern Ry. Co., Inc., 896 So. 2d 471 (Ala. 2004).

Pulley v. Norfolk Southern Ry. Co., Inc., 821 So. 2d 1008 (Ala. Civ. App. 2001).

Ex parte Wilkerson, 795 So. 2d 663 (Ala. 2000).

West’s Key Number Digest, Labor & Employment ☞2761.

2 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 33.13 (5th ed. 2010) (death claims under FELA).

APJI 17.01**ALABAMA PATTERN JURY INSTRUCTIONS**

Am. Jur. 2d, Federal Employers' Liability and Compensation Acts § 5.

**APJI 17.02 FELA—NEGLIGENCE—
DEFINITION [PL]**

(Name of defendant) was negligent if it failed to use reasonable care under the circumstances. It is negligent if it did something a reasonable and prudent railroad company would not have done under the same or similar circumstances, or it failed to do something a reasonable and prudent railroad company would have done under the same or similar circumstances.

Approved January 10, 2014

Notes on Use

Use this instruction to define negligence under the FELA. Although federal common law as developed by the federal courts governs actions under the FELA, the definition of negligence is the same as Alabama's common law definition.

References

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949).

Louisville & N. R. Co. v. Green, 255 Ala. 642, 53 So. 2d 358 (1951).

**APJI 17.03 FELA—DUTY TO PROVIDE
REASONABLY SAFE PLACE TO
WORK [PL]**

(Name of defendant) must use reasonable care to provide (name of plaintiff) a reasonably safe place to work. This includes sufficient tools and equipment to do the job.

((Name of defendant) must use reasonable care to provide (name of plaintiff) adequate help and manpower to help (him/her) to do the job.)

Approved February 7, 2014

Notes on Use

Use this instruction when it is necessary to explain the employer's duty. The second paragraph should be used only when the claim is based on the employer's failure to provide adequate help and manpower.

Whether the employer owed the employee a duty is a question of law. *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549, 552 (Ala. 2000).

APJI 17.02 (3d ed. 2013) included parenthetical language, "This duty is absolute and continuous and cannot be delegated by the defendant to another." The Committee omitted it from this edition, but it can be used in those cases when a party contends or suggests that the duty to maintain the tracks or the equipment has been delegated to a third party, such as a siding situation.

APJI 17.02 (3d ed. 2013) also included parenthetical language, "This duty becomes greater as the risk of injury to the employee becomes greater." The definition of negligence includes this concept and the Committee suggests such an instruction is unnecessary.

References

Mohr v. CSX Transportation, Inc., Ms. 1180338, 2020 WL 2610508 (Ala. May 22, 2020).

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), reh'g denied, 353 U.S. 943, 1 L. Ed. 2d 764, 77 S. Ct. 808 (1957).

Brady v. Southern Ry. Co., 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943), abrogation recognized, CSX Transp., Inc. v. McBride, 564 U.S. 685, 697 n. 4, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011).

Bailey v. Central Vermont Ry., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943).

CSX Transp., Inc. v. Miller, 46 So. 3d 434, 460 (Ala. 2010).

Glass v. Birmingham Southern R. Co., 905 So. 2d 789, 794-95 (Ala. 2004). The employer has a duty to provide adequate help and manpower to enable the employee to do the job, but the employer does not have a duty “to provide its employees with ‘sufficient’ tools or equipment separate from its duty to provide a safe workplace.”

Norfolk Southern Ry. Co. v. Denson, 774 So. 2d 549, 552 (Ala. 2000).

West’s Key Number Digest, Labor and Employment ⇨2840.

Am. Jur. 2d, Federal Employers’ Liability and Compensation Acts §§ 5, 24.

A.L.R. Library

Liability under Federal Employers’ Liability Act for failure to furnish individual safety equipment or to require its use, 80 A.L.R.2d 836.

**APJI 17.04 FELA—PLAINTIFF’S
CONTRIBUTORY NEGLIGENCE
ONLY DIMINISHES THE AMOUNT
OF RECOVERY [PL]**

(Name of defendant) says that (name of plaintiff/decedent)’s conduct was negligent and it was a cause of (his/her) (harm/death). This is called contributory negligence, and it means the failure to use reasonable care to prevent harm to oneself.

(Name of defendant) says (name of plaintiff/decedent)’s conduct was contributory negligence because (describe the conduct defendant says was a cause of the harm or death). (Name of defendant) must prove (name of plaintiff/decedent)’s conduct was contributory negligence.

(Name of defendant) must reasonably satisfy you from the evidence that:

1. (Name of plaintiff/decedent) was negligent; and,
2. (Name of plaintiff/decedent)’s negligence caused, in whole or in part, no matter how small, (his/her) (harm/death).

If (name of defendant) proved both of these things it does not mean (name of plaintiff) cannot recover; it means that (name of plaintiff) can recover only a smaller amount.

If you find that (name of plaintiff/decedent)’s negligence was the sole cause of the (harm/death), you must find for (name of defendant).

Approved February 7, 2014

Notes on Use

Use this instruction when the defendant pleads the issue of contributory negligence. Use APJI 17.05 after this instruction.

Do not use this instruction or APJI 17.03 when the claims are under the Safety Appliance Act or the Locomotive Inspection Act. They are strict liability acts.

References

45 U.S.C.A. § 53 states, in part:

“In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.”

Norfolk Southern Ry. Co. v. Sorrell, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638, 25 I.E.R. Cas. (BNA) 786, 2007 A.M.C. 192, 29 A.L.R. Fed. 2d 693 (2007). The same standard of causation applies to negligence and contributory negligence.

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506 n. 12, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

Page v. St. Louis Southwestern Ry. Co., 349 F.2d 820 (5th Cir. 1965).

West's Key Number Digest, Labor and Employment ⇐2781, 2984, 2997 to 3012.

Am. Jur. 2d, Federal Employers' Liability and Compensation Acts §§ 1 to 28, 71.

**APJI 17.05 FELA—CONTRIBUTORY
NEGLIGENCE—DIMINUTION OF
DAMAGES [PL]**

If you find that (name of plaintiff/decedent) and (name of defendant) were negligent and their negligence combined to cause the (harm/death), you will find for (name of plaintiff). You then must compare their negligence and determine what percentage of the cause of (name of plaintiff/decedent)'s (harm/death) was (his/her) own negligence.

To determine how much money to award (name of plaintiff), you must:

1. Determine the total amount of money that would reasonably compensate (him/her) if (he/she) had not been contributory negligent; and,
2. Determine what percentage of the total negligence was (name of plaintiff/decedents)'s own negligence and write that percentage on the verdict form.

Approved February 7, 2014

Notes on Use

This instruction is the statutory adoption of a comparative negligence rule for FELA actions.

The plaintiff's contributory negligence in an FELA action is not an absolute bar to his recovery based upon the negligence of the defendant. This is contrary to the Alabama common law rule with regard to contributory negligence. See *Pollard v. Rogers*, 234 Ala. 92, 173 So. 881 (1937); however, it requires a reduction of damages in proportion to the amount of negligence attributable to the plaintiff. The comparative negligence rule is applicable in both personal injury and death cases.

Do not use this instruction or APJI 17.03 when the claims are under the Safety Appliance Act or the Locomotive Inspection Act. These are strict liability acts.

References

45 U.S.C.A. § 53 states, in part:

“In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.”

Salotti v. Seaboard Coast Line R. Co., 293 Ala. 1, 299 So. 2d 695 (1974), holding modified by Nash v. Cosby, 574 So. 2d 700 (Ala. 1990).

Central of Ga. R. Co. v. Rush, 286 Ala. 333, 239 So. 2d 763 (1970).

Louisville & N.R. Co. v. Cooke, 267 Ala. 424, 103 So. 2d 791 (1958).

Louisville & N. R. Co. v. Grizzard, 238 Ala. 49, 189 So. 203 (1939), cert. denied, 308 U.S. 603, 84 L. Ed. 504, 60 S. Ct. 140 (1939).

West's Key Number Digest, Labor and Employment ☞2781, 2984, 2997 to 3012.

45 U.S.C.S. § 53, Notes 51, 167, 168.

**APJI 17.06 FELA—VIOLATION OF FEDERAL
LOCOMOTIVE INSPECTION
ACT—49 U.S.C. §§ 20701 TO 20703
[PL]**

Plaintiff (name of plaintiff) says (he/she) was defendant's (name of defendant) employee and (he/she) was harmed on the job for (name of defendant).

(Plaintiff (name of plaintiff) says (name of decedent) was defendant's (name of defendant) employee and (name of decedent) died on the job for (name of defendant).)

(Name of plaintiff) says (name of defendant)'s conduct violated the (Locomotive Inspection Act/a safety rule), and the violation caused (name of plaintiff/decedent)'s (harm/death). Specifically, (name of plaintiff) says (describe how plaintiff says defendant violated the LIA or a regulation).

(Name of defendant) denies it violated the (Act) (regulation(s)) or caused (name of plaintiff/decedent)'s (harm/death).

To recover on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff/decedent) was (name of defendant)'s employee on the job in the scope of (his/her) employment,

2. (Name of defendant) (violated the LIA because (describe the violation)) (violated 49 C.F.R. § ____ because (describe the violation)); and,

3. The violation caused, in whole or in part, no matter how small, (name plaintiff/decedent)'s (harm/death).

If (name of plaintiff) proved all these things, you must find for (him/her) and then you must determine what amount of money will reasonably compensate (him/her) for the (harm/death). If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved February 7, 2014

Notes on Use

Use this instruction when plaintiff's claim under the FELA is based on a violation of the Locomotive Inspection Act (LIA) or a regulation promulgated under the LIA. Neither the LIA nor the regulations apply unless the locomotive or tender was in use. Whether the locomotive or tender was in use is a question of law. *Wright v. Arkansas & Missouri R.R. Co.*, 574 F.3d 612, 29 I.E.R. Cas. (BNA) 825, 78 A.L.R. Fed. 2d 659 (8th Cir. 2009).

The LIA does not provide an independent cause of action. *CSX Transp., Inc. v. Miller*, 46 So. 3d 434 (Ala. 2010).

Plaintiff's contributory negligence, if any, does not reduce the amount of recovery. If the defendant violated the act or a regulation strict liability attaches if the violation caused harm or death. Cf., *Strickland v. Norfolk Southern Ry. Co.*, 692 F.3d 1151, 34 I.E.R. Cas. (BNA) 480 (11th Cir. 2012) (Safety Appliance Act). Therefore, do not give APJI 17.04 or 17.05.

References

49 U.S.C.A. § 20701 states:

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

Kurns v. Railroad Friction Products Corp., 565 U.S. 625 (2012). The Boiler Inspection Act pre-empted state common law tort claims for defective design and failure to warn against equipment manufacturer.

General Motors Corp. v. Kilgore, 853 So. 2d 171 (Ala. 2002). Boiler Inspection Act pre-empted wrongful death claim.

APJI 17.06**ALABAMA PATTERN JURY INSTRUCTIONS**

CSX Transp., Inc. v. Miller, 46 So. 3d 434 (Ala. 2010).

West's Key Number Digest, Railroads ⇨ 229(.5) to (8).

Am. Jur. 2d, Railroads § 130.

**APJI 17.07 FELA—VIOLATION OF FEDERAL
SAFETY APPLIANCE ACT—49
U.S.C. §§ 20301 TO 20306 [PL]**

Plaintiff (name of plaintiff) says (he/she) was defendant's (name of defendant) employee and (he/she) was harmed on the job for (name of defendant).

(Plaintiff (name of plaintiff) says (name of decedent) was defendant's (name of defendant) employee and (name of decedent) died on the job for (name of defendant).)

(Name of plaintiff) says (name of defendant)'s conduct violated the (Safety Appliance Act/a safety rule), and the violation caused (name of plaintiff/decedent)'s (harm/death). Specifically, (name of plaintiff) says (describe how plaintiff says defendant violated the act or a regulation).

(Name of defendant) denies it violated the (Act/regulation(s)), or caused (name of plaintiff/decedent)'s (harm/death).

To recover on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff/decedent) was (name of defendant)'s employee on the job in the scope of (his/her) employment,

2. (Name of defendant) (violated the SAA because (describe the violation)) (violated 49 C.F.R. § ____ because (describe the violation)); and,

3. The violation caused, in whole or in part, no matter how small, (name of plaintiff/decedent)'s (harm/death).

If (name of plaintiff) proved all these things, you must find for (him/her) and then you must determine what amount of money will reasonably compensate (him/her) for the (harm/death). If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved February 7, 2014

Notes on Use

The Safety Appliance Act (SAA) requires that certain appliances on railroad cars and/or locomotives operate properly. A violation of the Safety Appliance Act by the employing railroad may subject it to liability if the violation results in injury to an employee.

References

Carter v. Atlanta & St. A.B. Ry. Co., 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (1949).

Coray v. Southern Pac. Co., 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208 (1949).

Brasier v. Norfolk Southern Ry. Co., Inc., 896 So. 2d 471 (Ala. 2004).

Byrd v. Seaboard System R.R., Inc., 510 So. 2d 156 (Ala. 1987).

Seaboard Coast Line R. Co. v. Gillis, 294 Ala. 726, 321 So. 2d 202 (1975).

Shepherd v. Southern Ry. Co., 288 Ala. 50, 256 So. 2d 883 (1970).

West's Key Number Digest, Railroads ¶229(.5) to (8).

Am. Jur. 2d, Railroads § 129.

**APJI 17.08 FELA—CORPORATION ACTS
THROUGH ITS OFFICERS,
SERVANTS, AND EMPLOYEES [PL]**

A corporation acts through its officers, servants and employees. (Name of plaintiff) says that (he/she/name of decedent) was (harmed/killed) by (name of defendant)'s (officer/servant/employee)'s negligence. (Name of plaintiff) further says the (officer/servant/employee) acted within the scope of (his/her) employment when (he/she) caused (name of plaintiff/decedents)'s (harm/death).

(Name of defendant) is responsible for the (officer/servant/employee)'s conduct if (name of plaintiff) proves to your reasonable satisfaction that:

1. The (officer/servant/employee)'s conduct was negligent,
2. The negligent conduct was within the scope of the (officer/servant/employee)'s employment; and,
3. The negligent conduct caused (name of plaintiff/decedent)'s (harm/death).

Approved March 7, 2014

Notes on Use

This instruction states only a basic principle of law. In many cases, the acts of numerous employees (sometimes including the plaintiff) might contribute to the harm or death. If the plaintiff claims more than one employee caused his or her harm or the decedent's death, the instruction must be modified.

The user is cautioned that the word "agent" as used in 45 U.S.C.A. § 51 does not necessarily have its common law meaning. *Sinkler v. Missouri Pac. R. Co.*, 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958). The user should read *Sinker* and other cases to determine whether the common law definition of agent applies in a particular case. The analysis in *Hopson v. Texaco, Inc.*, 383 U.S. 262, 86 S. Ct. 765, 15 L. Ed. 2d 740, 1966 A.M.C. 281 (1966) is helpful.

APJI 17.08**ALABAMA PATTERN JURY INSTRUCTIONS**

The instruction must also be substantially modified if the FELA claim is based on a violation of the Federal Safety Appliance Act or the Federal Locomotive Inspection Act. A violation of these acts is negligence per se.

See APJI 3.01, Scope of Agency or Employment.

APJI 17.09 to 17.14

Reserved

**APJI 17.15 FELA—COMPENSATORY
DAMAGES—TYPES [PL]**

(Name of plaintiff) can recover only compensatory damages. Compensatory damages are awarded to fairly and reasonably compensate for the (harm/death) caused by (name of defendant)'s negligence, if any.

(Name of plaintiff) asks damages for the following:

(Net lost wages and benefits to the date of trial)

(Net lost wages and benefits in the future. They must be reduced to present value)

(Past (future) medical and hospital expenses)

(Physical pain and mental anguish)

(Permanent injury or disfigurement)

(Aggravation of pre-existing condition)

(Subsequent injury or disease caused by original injury)

Approved March 7, 2014

Notes on Use

Only compensatory damages are recoverable in a FELA action whether the action is for personal injury or death. However, if requested, the trial judge should instruct the jury it cannot award any damages to punish the defendant.

The compensatory damages that an injured employee can recover are no different in kind or character from those in a conventional tort action. Instructions on specific items of compensatory are stated in APJI 11.09, 11.10, 11.12, 11.13, 11.14, and 11.16.

APJI 17.16, Medical expenses, is included in this chapter and should be used instead of APJI 11.15.

APJI 17.15

ALABAMA PATTERN JURY INSTRUCTIONS

APJI 17.17, Loss of future earnings or future earning capacity, is included in this chapter and it should be used and not APJI 11.17.

APJI 17.18, Aggravation of pre-existing injury or condition, is included in this chapter and it should be used and not APJI 11.13.

The type of compensatory damages that can be recovered by the survivors is stated in APJI 17.15.

References

45 U.S.C.A. § 55 (employer's right of set-off).

Norfolk Southern Ry. Co., Inc. v. Bradley, 772 So. 2d 1147 (Ala. 2000).

West's Key Number Digest, Labor and Employment ¶2821 to 2826.

Ally W. Howell, Alabama Personal Injury and Torts §§ 11:2 to 11:6.

Am. Jur. 2d, Federal Employers' Liability and Compensation Acts §§ 70, 73.

**APJI 17.16 FELA—PERSONAL INJURY—
MEDICAL EXPENSES [PL]**

(Name of plaintiff) says that (name of defendant)'s conduct caused (him/her) expenses for medical care, treatment, and services.

The measure of damages for medical expenses is all reasonable expenses for medical care, treatment, and services caused by (name of defendant)'s conduct, (and the amount of reasonable expenses for medical care, treatment and services that (name of plaintiff) is reasonably certain to need in the future.)

You must decide if the treatment was reasonably necessary, if the expenses for it were reasonable in amount, and if the need for the treatment was caused by (name of defendant)'s conduct.

Approved March 7, 2014

Notes on Use

This instruction is modified from APJI 11.15 (3d ed. 2013) and the language about collateral source is removed.

Varhol v. National R.R. Passenger Corp., 909 F.2d 1557, 1565 n. 1, 30 Fed. R. Evid. Serv. 1152, 17 Fed. R. Serv. 3d 1 (7th Cir. 1990) affirmed the district court's ruling that denied plaintiff medical expenses as evidence because they were not relevant. It stated:

Section 5 of FELA, 45 U.S.C. § 55, provides that an employer "may set off . . . any sum it has contributed or paid to any insurance, . . . that may have been paid to the injured employee . . . on account of the injury. . . ." Despite the language "any sum it has *contributed or paid* to any insurance" (emphasis added), most courts have followed the lead of Judge Friendly's concurrence in Blake v. Delaware & Hudson Ry. Co., 484 F.2d 204, 207 (2d Cir.1973) and have held that an employer is entitled to set off the entire amount of benefits paid by a policy it pays for if the collective bargaining agreement between the employer and the employee's union expressly provides that the purpose of the policy is to indemnify the employer against

FELA liability rather than serve as a wage equivalent for the employees. See, e.g., *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1382–83 (9th Cir.1987); *Mead v. National R.R. Passenger Corp.*, 676 F.Supp. 92, 94–95 (D.Md.1987). The relevant collective bargaining agreement in this case provides that the policy is not a wage equivalent. Thus, under Judge Friendly’s reasoning, setoff would have been proper. Compare *Mead*, *supra*, which found setoff proper for Amtrak under the same policy.

The plaintiff can recover any medical expenses he or she has paid or is obligated to pay. *Croswell v. Union Pacific R. Co.*, 2010 WL 3463605 (D. Nev. 2010).

Additionally, the collateral source rule is not abolished in FELA claims, but it is effectively abolished by collective bargaining agreements. If the trial court determines that insurance is provided as wages or fringe benefits, the employee can recover the medical bills as a collateral source. See the analysis in *Croswell*.

References

45 U.S.C.A. § 55 (employer’s right of set-off).

See, *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 30 Fed. R. Evid. Serv. 1152, 17 Fed. R. Serv. 3d 1 (7th Cir. 1990) (employee cannot recover medical expenses that are paid by a health policy provided by the employer as part of a collective bargaining agreement).

Croswell v. Union Pacific R. Co., 2010 WL 3463605 (D. Nev. 2010).

CSX Transp., Inc. v. Williams, 230 Ga. App. 573, 497 S.E.2d 66 (1998).

West’s Key Number Digest, Damages ⇨101.

Am. Jur. 2d, Railroads 70, 73.

**APJI 17.17 FELA—LOSS OF FUTURE
EARNINGS OR FUTURE EARNING
CAPACITY [PL]**

(Name of plaintiff) says that (name of defendant)'s conduct caused (him/her) (to lose future earning capacity) (the loss of future earnings).

To decide the amount to compensate (name of plaintiff) for the (loss of future earnings) (loss of future earning capacity) you must first determine the effect, if any, the injury has upon (his/her) (future earnings) (earning capacity). To decide this question, consider the following:

1. (Name of plaintiff)'s health, physical ability, and earning power or capacity before (his/her) injury, pain and suffering, and what they are now,
2. The type and degree of (his/her) injury; and,
3. Whether you are reasonably satisfied the injury is permanent, or if it is not permanent, how long it will last.

If you decide that (name of plaintiff) (will lose future earnings) (has lost future earning capacity), you must then determine the amount (he/she) is reasonably certain to lose and reduce that amount to its present cash value.

Approved March 7, 2014

Notes on Use

Use this instruction when the plaintiff claims loss of future earning capacity or loss of future earnings. If a mortality table is in evidence, instruct using APJI 11.26.

Future lost earnings are computed on the plaintiff's net pay, i.e., his or her take-home pay. State and federal taxes are deducted from gross pay. *CSX Transp., Inc. v. Miller*, 46 So. 3d 434, 457 (Ala. 2010). Additionally, taxes paid to the Railroad Retirement Act may be deducted. See, *Miller* at 457–460.

Reusch v. Seaboard System R.R., 566 So. 2d 489, 491 (Ala. 1990) states:

“[This Court] . . . had implicitly held when evidence meets the requirements of [*Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) and *Culver v. Slater Boat Co.*, 722 F. 2d 114 (5th Cir. 114) (en banc) [*Culver II*], plaintiff is entitled to have his claim for loss of future earnings submitted to the jury.”

The method to reduce the future stream of earnings to present value is controlled by federal law. For example, in cases when seamen file federal maritime claims under the Jones Act or general maritime law, *J.F.P. Offshore, Inc. v. Diamond*, 600 So. 2d 1002 (Ala. 1992), the jury is instructed on the below-market discount rate method for determining the present value of future lost wages.

However, whether courts are bound by *Culver II*'s one particular method of discounting to present value may be in question. See, *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 108 S. Ct. 1837, 100 L. Ed. 2d 349, 2004 A.M.C. 459 (1988) (in an FELA case there are three methods to reduce future earnings to present value); *William v. Hercules Offshore, Inc.*, Civil Action No. 09-4539, 2011 WL 121554 (E.D. La. Jan. 1, 2011) (*Culver II* no longer determines how discount rate determined). Cf., *Meador By and Through Long v. U.S.*, 881 F.2d 1056 (11th Cir. 1989) (in medical malpractice Federal Tort Claims case *Culver II* method to determine discount rate applies when the parties do not stipulate how to calculate the discount rate); *Ageloff v. Delta Airlines Inc.*, 860 F.2d 379, 389 n. 38 (11th Cir. 1988) (*Culver II* discount rate methodology does not apply in a diversity wrongful death case); *Matter of Adventure Bound Sports, Inc.*, 858 F. Supp. 1192 n. 18 (S.D. Ga. 1994) (in Death on the High Seas Act case *Monessen* overruled *Culver II*'s one particular method of discounting to present value). The user should consider all available case authorities to determine the method to determine the discount rate.

Note the distinction between this instruction and APJI 11.16, which instructs on loss of earnings, or as sometime expressed in early Alabama cases, loss of time from work. See *Mackintosh Co. v. Wells*, 218 Ala. 260, 118 So. 276 (1928).

References

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 108 S. Ct. 1837, 100 L. Ed. 2d 349, 2004 A.M.C. 459 (1988).

J.F.P. Offshore, Inc. v. Diamond, 600 So. 2d 1002 (Ala. 1992).

Reusch v. Seaboard System R.R., 566 So. 2d 489, 491 (Ala. 1990).

West's Key Number Digest, Damages ⇨38, 99, 208(4), 216(8), 226.

West's Key Number Digest, Labor and Employment ⇨2823.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.05 (5th ed. 2010).

Jenelle Mims Marsh, Alabama Law of Damages § 36:4 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 136 to 164.

Am. Jur. 2d, Federal Employers' Liability and Compensation Acts § 70.

**APJI 17.18 FELA—AGGRAVATION OF PRE-EXISTING INJURY OR CONDITION
[PL]**

The fact that (name of plaintiff) had a pre-existing condition or injury that made it more likely that (he/she) would be harmed by (name of defendant)’s conduct than a person in good health does not mean (he/she) cannot recover damages. If (name of defendant)’s conduct caused (name of plaintiff)’s harm, it is responsible for the damages that result from the harm.

If (name of defendant)’s conduct aggravated the condition or injury, you must then decide to what extent (name of plaintiff)’s condition was aggravated by (name of defendant)’s conduct. Then award (name of plaintiff) an amount that reasonably compensates (him/her) for the aggravation.

You must first decide if (name of defendant)’s conduct aggravated (name of plaintiff)’s pre-existing condition or injury. If you find it did, you must, if possible, determine what part of (name of plaintiff)’s present condition results from the pre-existing condition or injury and what part results from the aggravation. If you can separate the two, you award only an amount that reasonably compensates (him/her) for the aggravation. If you cannot separate the two, (name of defendant) is responsible for all the harm and you must compensate (name of plaintiff) for the harm.

Approved March 7, 2014

Notes on Use

Use this instruction and do not use APJI 11.13 (3d ed. 2013) to instruct on aggravation of a pre-existing condition or injury.

If possible, the instruction should be framed within the context of the facts of the case, see, e. g., *Stevens v. Bangor and Aroostook R. Co.*, 97 F.3d 594, 601, 45 Fed. R. Evid. Serv. 281 (1st Cir. 1996). Although it probably requires the parties’ agreement before the trial court can state, “There is evidence in this case. . .”, such an

introduction will clarify the issues for the jury when the trial judge follows this statement with the parties' contentions. For instance, "(Name of defendant) says (name of plaintiff)'s condition is caused by (his/her) degenerative back disease and long history of smoking and it is not caused by (name of defendant)'s conduct."

References

CSX Transp., Inc. v. Miller, 46 So. 3d 434, 448–49 (Ala. 2010) and the cases cited in Miller at 445–47.

West's Key Number Digest, Damages ⇨210(1).

West's Key Number Digest, Federal Courts § 3703(4).

West's Key Number Digest, Labor & Employment ⇨2783, 2789, 2820.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.11 (5th ed. 2010) (general).

Jenelle Mims Marsh, Alabama Law of Damages § 36:10 (6th ed. 2012).

Am. Jur. 2d, Damages §§ 250 to 253.

**APJI 17.19 FELA—MITIGATION OF DAMAGES
[PL]**

(Name of defendant) says that (name of plaintiff) did not mitigate (his/her) damages because (state how plaintiff failed to mitigate). (Name of defendant) must prove to your reasonable satisfaction that (name of plaintiff) did not mitigate (his/her) damages.

(Name of plaintiff) must have done what a reasonable person, in the same or similar circumstances, would have done to avoid or minimize the harm or economic loss caused by (name of defendant)'s wrongful conduct. (Name of plaintiff) cannot recover any damages (he/she) could have avoided or minimized through reasonable effort.

(Medical treatment)

(Name of plaintiff) must seek medical advice, treatment, and follow reasonable medical advice. (Name of plaintiff) must undergo treatment or surgery if a reasonable person in the same or similar circumstances would have done so.

(Return to work)

If (name of plaintiff) is able to return to work (he/she) cannot wait passively for someone to offer work. (He/she) must seek and take appropriate work when (he/she) is able to work.

Approved March 7, 2014

Notes on Use

Use the appropriate parts of this instruction when there is evidence that the plaintiff unreasonably failed to mitigate his or her harm or economic damages.

References

CSX Transp., Inc. v. Miller, 46 So. 3d 434 (Ala. 2010).

West's Key Number Digest, Damages ☞62 to 65, 155, 157(2).

West's Key Number Digest, Labor & Employment ☞2828.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 40.02 (5th ed. 2010) (General).

Jenelle M. Marsh, Alabama Law of Damages §§ 2:9, 28:10, 36:12 (6th ed. 2012) (General).

Am. Jur. 2d, Damages § 724.

**APJI 17.20 FELA—DEATH CASE—DAMAGES
[PL]**

(Name of plaintiff) asks you to award damages to (name the dependent persons). The measure of damages is the pecuniary and monetary loss of what each of them reasonably could have expected (name of decedent) to have provided for their benefit had (name of decedent) lived. A pecuniary loss is a loss that you can measure in money.

What a person could have reasonably expected to receive from (name of decedent) is tied to (name of decedent's) earning capacity.

You must determine how much to award to each. To determine how much to award, you may consider the following if any are proved to your reasonable satisfaction by the evidence:

1. Whatever benefits of a pecuniary or monetary value, including money, goods and services (name of decedent) customarily contributed to each.
2. What (name of decedent) was earning and (he/she) would have been likely to earn in the future.
3. Any other monies or assets (name of decedent) would have received in the future during (his/her) lifetime.
4. What amount of these future earnings, monies, or assets (name of decedent) would have spent for the use and benefit of each, and what (he/she) would have given each to spend on (himself/herself), and what (name of decedent) would have spent on (himself/herself) for (his/her) own personal expenses.
5. (Name of decedent)'s earning capacity in the future, (his/her) work habits, whether (he/she) was a thrifty person, (his/her) health, age, life expectancy at the time of death, and the length of time in the future (he/she) would earn or otherwise receive income from any source.

6. The length of time during which each would have been likely to have received benefits of a pecuniary or monetary value from (name of decedent) had (he/she) lived.

7. All other facts shown by the evidence which have a bearing upon what pecuniary or monetary benefits, if any, each would have received had (name of decedent) lived.

You cannot award any amount for grief or bereavement, or the loss of society or companionship.

Approved April 11, 2014

Notes on Use

Use this instruction in any FELA death case, and if any of the survivors are minor children, give APJI 17.21 if the evidence supports an instruction on parental guidance.

45 U.S.C.A. § 59 lists the persons to whom the jury can award damages in an FELA death case.

When an FELA action is filed in state court the questions about damages are federal in character. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S. Ct. 755, 62 L. Ed. 2d 689, 1980 A.M.C. 1811, 10 Fed. R. Evid. Serv. 130 (1980); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985). The measure of damages in a death case is "equivalent to compensation for deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased employee." *Birmingham Belt R. Co. v. Hendrix*, 215 Ala. 285, 110 So. 312, 314 (1926); *Chesapeake & O. Ry. Co. v. Kelly*, 241 U.S. 485, 36 S. Ct. 630, 60 L. Ed. 1117 (1916). This principle is more succinctly stated in *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 291 (9th Cir. 1975), as follows: "[The] measure of damages . . . is the pecuniary loss to the beneficiaries, *the amount that they reasonably could have expected to have been applied to their benefit had the decedent lived.*" (emphasis ours). However, the child can recover only the actual pecuniary loss; not the value of services that must be provided by another. *Davis' Adm'r v. Cincinnati, N.O. & T.P. Ry. Co.*, 172 Ky. 55, 188 S.W. 1061 (1916).

No Alabama case defines the words "pecuniary benefits". The

user may find helpful the Supreme Court of Texas' definition of the same words used in the Texas Death Statute. It stated: "[b]y pecuniary benefits is meant not only money, but everything that can be valued in money, and includes, in the case of a minor child who is suing for the death of a parent, the reasonable value of such nurture, care, and education as the child would have received from the deceased parent had such parent lived." *International & G.N. Ry. Co. v. McVey*, 99 Tex. 28, 87 S.W. 328 (1905), overruled to the extent the Texas Wrongful Death Statute limited recover to pecuniary loss only, *Sanchez v. Schindler*, 651 S.W. 2d 249 (Tex. 1983).

Dependents are not limited to the contributions the decedent would have made from his railroad earnings. *Martin v. Atlantic Coast Line R. Co.*, 268 F.2d 397, 91 A.L.R.2d 472 (5th Cir. 1959). The issue in *Martin* was whether the jury can consider any inheritance decedent may come into. The Court stated: "[T]he damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injury." *Mobile & O.R. Co. v. Williams*, 219 Ala. 238, 121 So. 722 (1929) apparently holds to the contrary. Therefore, the user must be careful to determine the present law on this point. See element 3 in the instruction.

Future pecuniary losses must be reduced to present cash value. *Chesapeake & O. Ry. Co. v. Kelly*, 241 U.S. 485, 491, 36 S. Ct. 630, 60 L. Ed. 1117 (1916). See *J.F.P. Offshore, Inc. v. Diamond*, 600 So. 2d 1002 (Ala. 1992) (jury instructed on below market discount rate method for determining the present value of lost wages). See, *Reusch v. Seaboard System R.R.*, 566 So. 2d 489 (Ala. 1990). See, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275, 1991 A.M.C. 1 (1990) (Congress incorporated the FELA into the Jones Act).

If the case involves contributory negligence give APJI 17.04.

The prohibition of any consideration of inflationary factors in ascertaining a damages award for loss of future wages under the Jones Act, Federal Employers' Liability Act, or general maritime law is unfair to plaintiffs. *Culver v. Slater Boat Co.*, 688 F.2d 280, 1983 A.M.C. 2251 (5th Cir. 1982), opinion withdrawn in part on rehearing, *Culver v. Slater Boat Co.*, 722 F. 2d 114 (5th Cir. 1983).

The right to maintain a suit for the death of an employee covered by the FELA is vested in the personal representative of the estate of the decedent. 45 U.S.C.A. § 52. The personal repre-

sentative sues for the benefit of the surviving widow or husband or children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. 45 U.S.C.A. § 59.

The plaintiff is suing for the benefit of the survivors, and the jury must determine the amount of each child's loss, *Gulf, C. & S.F. Ry. Co. v. McGinnis*, 228 U.S. 173, 33 S. Ct. 426, 57 L. Ed. 785 (1913). The question arises whether the jury should apportion the damages. The damages do not have to be apportioned unless a party requests it be done. *Central Vermont R. Co. v. White*, 238 U.S. 507, 35 S. Ct. 865, 59 L. Ed. 1433 (1915); *Mobile & O.R. Co. v. Williams*, 221 Ala. 402, 129 So. 60 (1930). The jury can determine the damages and the trial court can, in an ancillary proceeding, apportion the award to the several survivors.

References

45 U.S.C.A. § 51, 52, 55, 59.

Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 493, 100 S. Ct. 755, 62 L. Ed. 2d 689, 1980 A.M.C. 1811, 10 Fed. R. Evid. Serv. 130 (1980).

Mellon v. Goodyear, 277 U.S. 335, 48 S. Ct. 541, 72 L. Ed. 906 (1928).

Central Vermont R. Co. v. White, 238 U.S. 507, 35 S. Ct. 865, 59 L. Ed. 1433 (1915).

Gulf, C. & S.F. Ry. Co. v. McGinnis, 228 U.S. 173, 33 S. Ct. 426, 57 L. Ed. 785 (1913).

Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59, 33 S. Ct. 192, 57 L. Ed. 417 (1913).

Mobile & O.R. Co. v. Williams, 226 Ala. 541, 147 So. 819 (1933), cert. denied, 290 US 655, 78 L Ed 568, 54 S Ct 71.

Alabama Great Southern Ry. Co. v. Norrell, 225 Ala. 503, 143 So. 904 (1932).

Mobile & O.R. Co. v. Williams, 221 Ala. 402, 129 So. 60 (1930).

Alabama Great Southern R. Co. v. Cornett, 214 Ala. 23, 106 So. 242 (1925).

Louisville & N.R. Co. v. Fleming, 194 Ala. 51, 69 So. 125 (1915).

Martin v. Atlantic Coast Line R. Co., 268 F.2d 397, 91 A.L.R.2d 472 (5th Cir. 1959).

Stark v. Chicago, North Shore & Milwaukee Ry. Co., 203 F.2d 786 (7th Cir. 1953).

West's Key Number Digest, Death ⌘64 to 68, 86(2), 95(2), 95(3).

West's Key Number Digest, Labor and Employment ⌘2750, 2763 to 2770, 2831.

West's Key Number Digest, Trial ⌘295(11).

Am. Jur. 2d, Death § 183.

Am. Jur. 2d, Federal Employers' Liability and Compensation Acts §§ 18, 72, 77, 78.

45 U.S.C.S. § 51, Notes 931 to 936, 1011 to 1027, 1029 to 1034.

Talcott J. Franklin, Calculating Damages for Loss Of Parental Nurture Through Multiple Regression Analysis, 52 W. L. L. Rev. 271 (1995).

**APJI 17.21 FELA—DEATH—CHILDREN'S
DAMAGES FOR LOSS OF CARE,
ETC. [PL]**

If you find for (name of plaintiff), you can award damages to (name the dependent minor child/children) for any care, attention, instruction, training, advice, and parental guidance (he/she) lost as a result of (name of decedent)'s death.

To determine how much to award you may consider the following if proved to your reasonable satisfaction by the evidence: (Name of decedent)'s

1. Intellectual powers.
2. Moral character.
3. The interest or disinterest (he/she) had in the (child/children).
4. The care, attention, training, advice, and parental advice you find (name of decedent) would have provided the (child/children) had (name of decedent) lived.

Approved April 11, 2014

Notes on Use

Surviving children can recover the monetary value of any lost parental care, attention, instruction, training, advice, and guidance, often referred to collectively as "nurture". Such damages may be awarded upon proof that the decedent's parental characteristics were such that his children had a reasonable expectation of receiving such care and parental guidance. The damages may be awarded only for the period of the children's minority, except where the testimony has proved that for special reasons the child would have been dependent for a period extending beyond this minority. In that event, see APJI 17.22.

References

See references in APJI 17.20.

Mellon v. Goodyear, 277 U.S. 335, 48 S. Ct. 541, 72 L. Ed. 906 (1928).

Norfolk & W. R. Co. v. Holbrook, 235 U.S. 625, 35 S. Ct. 143, 59 L. Ed. 392 (1915).

Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59, 33 S. Ct. 192, 57 L. Ed. 417 (1913).

Gulf, C. & S.F. Ry. Co. v. McGinnis, 228 U.S. 173, 33 S. Ct. 426, 57 L. Ed. 785 (1913).

Alabama Great Southern Ry. Co. v. Norrell, 225 Ala. 503, 143 So. 904 (1932).

Mobile & O.R. Co. v. Williams, 221 Ala. 402, 129 So. 60 (1930).

Mobile & O.R. Co. v. Williams, 219 Ala. 238, 121 So. 722 (1929).

Alabama Great Southern R. Co. v. Cornett, 214 Ala. 23, 106 So. 242 (1925).

Louisville & N.R. Co. v. Fleming, 194 Ala. 51, 69 So. 125 (1915) (dependent parents).

Kozar v. Chesapeake & O. Ry. Co., 449 F.2d 1238 (6th Cir. 1971) (the occasional gift and casual advice, standing alone, do not support recovery for pecuniary loss).

West's Key Number Digest, Death ☞86(1), 86(2), 95(1), 95(3), 95(3), 101, 104(4).

**APJI 17.22 FELA—DEATH—DAMAGES AFTER
CHILD'S MINORITY [PL]**

(Name of plaintiff) asks you to award damages to (name the child/children) until (state the period for which the plaintiff asks damages).

You may award damages past the time (name the child/children) (is/are) 19 if you are reasonably satisfied by the evidence that:

1. (Name the child/children) would have depended on (name of decedent) to provide (him/her) pecuniary benefits after (name the child/children) nineteenth birthday; or,

2. (Name the child/children) reasonably expected to receive pecuniary benefits from (name of decedent) after (name the child/children)'s nineteenth birthday.

Approved April 11, 2014

Notes on Use

In general, the recovery of pecuniary losses by children is limited to the period of their minority. Awards for post-minority damages to surviving children are limited to those cases where evidence shows either (1) dependency of the child of the deceased parent past minority or (2) a reasonable expectation of post-minority pecuniary benefits by a child from the decedent.

References

Norfolk & W. R. Co. v. Holbrook, 235 U.S. 625, 35 S. Ct. 143, 59 L. Ed. 392 (1915).

Kozar v. Chesapeake & O. Ry. Co., 449 F.2d 1238 (6th Cir. 1971).

Stark v. Chicago, North Shore & Milwaukee Ry. Co., 203 F.2d 786 (7th Cir. 1953).

Boller v. Pennsylvania R. Co., 185 F. Supp. 505 (N.D. Ind. 1960).

APJI 17.22**ALABAMA PATTERN JURY INSTRUCTIONS**

Hines v. Walker, 225 S.W. 837 (Tex. Civ. App. Fort Worth 1920).

West's Key Number Digest, Death ☞18(1) to 18(3).

**APJI 17.23 FELA—DEATH—DAMAGES—
CONSCIOUS PAIN AND
SUFFERING [PL]**

If you find for (name of plaintiff) you can award damages for (name of decedent)'s conscious pain and suffering.

(Name of plaintiff) can recover for any pain and suffering (name of decedent) had while (he/she) was conscious during the time between (his/her) injury and death. (Name of plaintiff) cannot get damages for (name of decedent)'s unconscious pain and suffering. You cannot award damages for pain and suffering if (name of decedent)'s death was instantaneous.

The amount of damages you can award is an amount you determine will fairly and reasonably compensate (name of plaintiff) for (name of decedent)'s conscious pain and suffering.

Approved April 11, 2014

Notes on Use

Use this instruction when there is substantial evidence the defendant's conduct caused the decedent's death and the decedent had conscious pain and suffering between the time of the injury and death. Pain and suffering which is instantaneous and contemporaneous with his or her death is not compensable. The issue should be submitted to the jury when the evidence conflicts about whether pain and suffering was instantaneous and contemporaneous with the death or whether there was conscious pain and suffering.

References

St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U.S. 648, 35 S. Ct. 704, 59 L. Ed. 1160 (1915).

Norfolk & W. R. Co. v. Holbrook, 235 U.S. 625, 35 S. Ct. 143, 59 L. Ed. 392 (1915).

APJI 17.23**ALABAMA PATTERN JURY INSTRUCTIONS**

Atlantic Coast Line R. Co. v. Taylor, 260 Ala. 401, 71 So. 2d 27 (1954).

Birmingham Belt R. Co. v. Hendrix, 215 Ala. 285, 110 So. 312 (1926).

Louisville & N.R. Co. v. Porter, 205 Ala. 131, 87 So. 288 (1920).

West's Key Number Digest, Death ☞82, 85, 104(4).

45 U.S.C.S. § 59, Notes 1016.

Am. Jur. 2d, Federal Employers' Liability and Compensation Acts § 79.

APJI 17.24 VERDICT FORM—CONTRIBUTORY NEGLIGENCE SUBMITTED TO JURY [PL]

1. We, the jury, find in favor of the ____ plaintiff ____ defendant.

IF YOU FIND FOR THE PLAINTIFF, COMPLETE PARAGRAPH 2 OF THIS VERDICT FORM. IF YOU FIND FOR THE DEFENDANT, SIGN THE VERDICT FORM AND NOTIFY THE COURT YOU HAVE A VERDICT.

2. We, the jury, fix plaintiff's total damages at \$_____.
_____.

Do not reduce this amount by the percentage, if any, you determine in paragraph 3. I will do the calculation when I prepare the judgment.

IF YOU FIND THE (PLAINTIFF/DECEDENT) WAS NEGLIGENT AND (HIS/HER) NEGLIGENCE CONTRIBUTED TO (HIS/HER) (HARM/DEATH), YOU MUST DETERMINE WHAT PERCENTAGE OF THE TOTAL NEGLIGENCE WAS (HIS/HER) CONTRIBUTORY NEGLIGENCE. WRITE THAT PERCENT IN THE SPACE BELOW.

3. We, the jury, find (name of plaintiff/decedent) was ____% negligent.

FOREPERSON
Date: _____

Approved April 11, 2014

Chapter 18

Fraud [PL]

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- APJI 18.00 Introduction [PL]
- APJI 18.01 Intentional False Statement [PL]
- APJI 18.02 Reckless False Statement [PL]
- APJI 18.03 Mistaken False Statement [PL]
- APJI 18.04 Deceit [PL]
- APJI 18.05 Concealment [PL]
- APJI 18.06 Concealment—Obligation to Make Known As Jury Issue [PL]
- APJI 18.07 Promissory Fraud [PL]
- APJI 18.08 Definition of Important Fact/Promise [PL]
- APJI 18.09 Opinions as Statements of Fact [PL]
- APJI 18.10 Reliance [PL]
- APJI 18.11 Defense—Statute of Limitations [PL]
- APJI 18.12 Future Act [PL]
- APJI 18.13 to 18.19 Reserved
- APJI 18.20 Fraudulent Transfer—Present Creditors—Ala. Code § 8-9A-5 (1975) (West's Alabama Code) [PL]
- APJI 18.21 Fraudulent Transfer—Present and Future Creditors—Ala. Code § 8-9A-4(c) (1975) (West's Alabama Code) [PL]
- APJI 18.22 Fraudulent Transfer—Actual Intent to Defraud Creditors—Ala. Code § 8-9A-4(a) (1975) (West's Alabama Code) [PL]
- APJI 18.23 Fraudulent Transfer—Insolvency—Ala. Code § 8-9A-2 (1975) (West's Alabama Code) [PL]
- APJI 18.24 Fraudulent Transfer—Value—Defined—Ala. Code § 8-9A-3 (1975) (West's Alabama Code) [PL]
- APJI 18.25 Fraudulent Transfer—Transferee—Defenses—Ala. Code § 8-9A-3 (1975) (West's Alabama Code) [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Date Approved	Prior Instruction Number
APJI 18.20 Fraudulent Transfer—Present Creditors—Ala. Code § 8-9A-5 (1975) (West’s Alabama Code) [PL]	8/11/17	18.20
APJI 18.21 Fraudulent Transfer—Present and Future Creditors—Ala. Code § 8-9A-4(c) (1975) (West’s Alabama Code) [PL]	8/11/17	18.21
APJI 18.22 Fraudulent Transfer—Actual Intent to Defraud Creditors—Ala. Code § 8-9A-4(a) (1975) (West’s Alabama Code) [PL]	8/11/17	18.22
APJI 18.23 Fraudulent Transfer—Insolvency—Ala. Code § 8-9A-2 (1975) (West’s Alabama Code) [PL]	9/21/17	18.23
APJI 18.24 Fraudulent Transfer—Value—Defined—Ala. Code § 8-9A-3 (1975) (West’s Alabama Code) [PL]	8/11/17	18.24
APJI 18.25 Fraudulent Transfer—Transferee—Defenses—Ala. Code § 8-9A-3 (1975) (West’s Alabama Code) [PL]	8/11/17	18.25

APJI 18.00 INTRODUCTION [PL]

Plaintiff (name of plaintiff) says that (he/she) was harmed by the false statements of defendant (name of defendant). A false statement may be spoken, written or other conduct. (Name of plaintiff) says the false statement is (describe claim). (Name of defendant) denies (describe defense).

Notes on Use

Use this introductory instruction in any case of fraud. It is to be followed by the appropriate instruction for the specific type of fraud. See the following specific instructions:.

APJI 18.01 Intentional False Statement.

APJI 18.02 Reckless False Statement.

APJI 18.03 Mistaken False Statement.

APJI 18.04 Deceit.

APJI 18.05 Concealment.

APJI 18.07 Promissory Fraud.

Ala. Code §§ 6-5-101 to 6-5-104 (1975) (West's Alabama Code) state the circumstances in which legal frauds may occur. A legal fraud may arise from a willful, reckless, innocent, or mistaken misrepresentation of a material fact. Ala. Code § 6-5-101 (1975) (West's Alabama Code). Under this section, intent to deceive is not necessary. The necessary intent is intent to induce action. A legal fraud may arise from the suppression of a material fact that a party is obligated to communicate. Ala. Code § 6-5-102 (1975) (West's Alabama Code). Ala. Code § 6-5-103 (1975) (West's Alabama Code) states that a legal fraud may arise from a misrepresentation of a material fact made willfully to induce another to act; concealment of a material fact if done in such manner as to deceive or mislead; or a fraudulent or reckless representation of facts as true which the party may not know to be false, if intended to deceive. Mere concealment under this section does not constitute a fraud unless done in a manner to deceive and mislead. In Ala. Code § 6-5-103 (1975) (West's Alabama Code) intent to deceive is necessary. It is important to note this distinction between actions

under Ala. Code § 6-5-101 (1975) (West's Alabama Code) and Ala. Code § 6-5-103 (1975) (West's Alabama Code). Ala. Code § 6-5-104 (1975) (West's Alabama Code) expressly requires an intent to deceive as an essential element in actions thereunder.

References

Hall Motor Co. v. Furman, 285 Ala. 499, 234 So. 2d 37 (1970).

Cartwright v. Braly, 218 Ala. 49, 117 So. 477 (1928).

Kilby Locomotive & Machine Works v. D.B. Lacy & Son, 12 Ala. App. 464, 67 So. 754 (1915).

Hockensmith v. Winton, 11 Ala. App. 670, 675, 66 So. 954 (1914).

Am. Jur. 2d, Fraud and Deceit §§ 1 to 30.

Lewis Morris and Gary W. Thompson, Health Care Fraud: Past, Present and Future Reflections on the Government's Stick and Carrot Approach to Fighting Health Care Fraud, 51 Ala. L. Rev. 319 (Fall, 1999).

Timothy Stoltzfuz Jost and Sharon L. Davies, Health Care Fraud: Past, Present and Future The Empire Strikes Back: A Critique of the Backlash against Fraud and Abuse Enforcement, 51 Ala. L. Rev. 239 (Fall, 1999).

Pamela H. Bucy, Health Care Fraud: Past, Present and Future Growing Pains: Using the False Claims Act to Combat Health Care Fraud, 51 Ala. L. Rev. 57 (Fall, 1999).

Eugene R. Anderson, John A. MacDonald and James J. Fournier, Fighting Insurance Company Fraud With RICO: The Supreme Court Clears the Way under the McCarran- Ferguson Act, 22 Am. J. Trial Advoc. 267 (Fall, 1998).

Calvin S. Rockefeller, Professional Negligence: An Attorney's Duty to Discover and Prevent Fraud Against His or Her Client by Employees or Officers of a Corporation, 20 J. Legal Prof. 343 (1995—1996).

Ala. R. Civ. P. 9(b).

A.L.R. Library

Computer fraud, 70 A.L.R.5th 647.

Fraud, misrepresentation, or deception as estopping reliance on statute of limitations, 43 A.L.R.3d 429.

Fraud and deceit: Liability in damages for preventing bringing of action before its being barred by statute of limitations, 33 A.L.R.3d 1077.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

Overvaluation in proof of loss of property insured as fraud avoiding fire insurance policy, 16 A.L.R.3d 774.

Comment Note.—“Out of pocket” or “benefit of bargain” as proper rule of damages for fraudulent representations inducing contract for the transfer of property, 13 A.L.R.3d 875.

Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346.

Necessity of showing damage to establish fraud as defense to action on contract, 91 A.L.R.2d 346.

Admissibility, in tort action for fraud, of evidence as to price for which the assertedly defrauded purchaser of property sold it, 31 A.L.R.2d 1064.

Misrepresentation as to matters of foreign law as actionable, 24 A.L.R.2d 1039.

Necessity of pleading that tort was committed by servant, in action against master, 4 A.L.R.2d 292.

**APJI 18.01 INTENTIONAL FALSE STATEMENT
[PL]**

Plaintiff (name of plaintiff) says that defendant (name of defendant) intentionally made a false statement that harmed (him/her/it). To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of defendant) intentionally stated to (name of plaintiff) that a present or past important fact was true;

2. That (name of defendant)'s statement was false;

3. That (name of defendant) knew that the statement was false when (he/she/it) made it and (name of plaintiff) did not know it was false;

4. That (name of defendant) intended that (name of plaintiff) rely on the statement;

5. That (name of plaintiff) reasonably relied on the statement; and

6. That (name of plaintiff) (acted/did not act) and was harmed.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must determine what amount of money to award (him/her/it) for the harm. If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

References

Exxon Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources, 986 So. 2d 1093, 173 O.G.R. 312 (Ala. 2007).

Baker v. Metropolitan Life Ins. Co., 907 So. 2d 419 (Ala. 2005).

**APJI 18.02 RECKLESS FALSE STATEMENT
[PL]**

Plaintiff (name of plaintiff) says that defendant (name of defendant) recklessly made a false statement that harmed (him/her/it). To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of defendant) recklessly stated to (name of plaintiff) that a present or past important fact was true;
2. That (name of defendant)'s statement was false;
3. That (name of defendant) made the statement without knowing whether it was true when (he/she/it) made it and (name of plaintiff) did not know it was false;
4. That (name of defendant) intended that (name of plaintiff) rely on the statement;
5. That (name of plaintiff) reasonably relied on the statement; and
6. That (name of plaintiff) (acted/did not act) and was harmed.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must determine what amount of money to award (him/her/it) for the harm. If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

References

Exxon Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources, 986 So. 2d 1093, 173 O.G.R. 312 (Ala. 2007).

Baker v. Metropolitan Life Ins. Co., 907 So. 2d 419 (Ala. 2005).

**APJI 18.03 MISTAKEN FALSE STATEMENT
[PL]**

Plaintiff (name of plaintiff) says that defendant (name of defendant) by mistake and innocently made a false statement that harmed (him/her/it). To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of defendant) stated to (name of plaintiff) that a present or past important fact was true;
2. That (name of defendant)'s statement was false;
3. That (name of defendant) intended that (name of plaintiff) rely on the statement;
4. That (name of plaintiff) reasonably relied on (name of defendant)'s statement; and
5. That (name of plaintiff) (acted/did not act) and was harmed.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must determine what amount of money to award (him/her/it) for the harm. If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

References

Exxon Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources, 986 So. 2d 1093, 173 O.G.R. 312 (Ala. 2007).

Baker v. Metropolitan Life Ins. Co., 907 So. 2d 419 (Ala. 2005).

APJI 18.04 DECEIT [PL]

Plaintiff (name of plaintiff) says that defendant (name of defendant) intentionally made a false statement that harmed (him/her/it). To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of defendant) intentionally stated to (name of plaintiff) that a present or past important fact was true;
2. That (name of defendant)'s statement was false;
3. That (name of defendant) knew that the statement was false when (he/she/it) made it and (name of plaintiff) did not know it was false;
4. That (name of plaintiff) (acted/did not act) and was harmed.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must determine what amount of money to award (him/her/it) for the harm. If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Notes on Use

Use this instruction in actions for deceit. Deceit can arise in four situations: (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or (4) a promise made without any intention of performing it. Ala Code § 6-5-104 (1975) (West's Alabama Code).

The instruction defining Important Fact/Promise (APJI 18.08) should be read immediately after this instruction, unless already given.

References

Ala. Code § 6-5-103 (1975) (West's Alabama Code).

Ala. Code § 6-5-104 (1975) (West's Alabama Code).

Ala. R. Civ. P. 9(b).

Osborn v. Custom Truck Sales & Service, a Div. of Alley-Cassetty Coal, Inc., 562 So. 2d 243, 12 U.C.C. Rep. Serv. 2d 664 (Ala. 1990).

Hall Motor Co. v. Furman, 285 Ala. 499, 234 So. 2d 37 (1970).

Boriss v. Edwards, 262 Ala. 172, 77 So. 2d 909 (1954).

West's Key Number Digest, Fraud ⇌13.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 20.13 (5th ed. 2010).

Am. Jur. 2d, Fraud and Deceit §§ 1 et seq.

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Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract, 11 A.L.R.4th 774.

Fraud, misrepresentation, or deception as estopping reliance on statute of limitations, 43 A.L.R.3d 429.

Fraud and deceit: Liability in damages for preventing bringing of action before its being barred by statute of limitations, 33 A.L.R.3d 1077.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons, 28 A.L.R.3d 1412.

Borrower's initiation of, or fraud contributing to, usurious transaction as affecting rights or remedies of the parties, 16 A.L.R.3d 510.

Overvaluation in proof of loss of property insured as fraud avoiding fire insurance policy, 16 A.L.R.3d 774.

Comment Note.—“Out of pocket” or “benefit of bargain” as proper rule of damages for fraudulent representations inducing contract for the transfer of property, 13 A.L.R.3d 875.

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APJI 18.04

Procuring signature by fraud as forgery, 11 A.L.R.3d 1074.

Avoidance of bank's check certification secured by fraud, 100 A.L.R.2d 1197.

Necessity of showing damage to establish fraud as defense to action on contract, 91 A.L.R.2d 346.

Admissibility, in tort action for fraud, of evidence as to price for which the assertedly defrauded purchaser of property sold it, 31 A.L.R.2d 1064.

False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14.

Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or rescission by vendee, 14 A.L.R.2d 1347.

APJI 18.05 CONCEALMENT [PL]

Plaintiff (name of plaintiff) says that (he/she/it) was harmed because defendant (name of defendant) hid or withheld important fact(s) from (him/her/it). To recover, (name of plaintiff) must prove to your reasonable satisfaction by all the evidence all of the following:

1. That (state the disputed fact(s) the trial judge has determined, if true, impose a duty to disclose on the defendant);
2. (Name of defendant) hid or withheld an important fact from (name of plaintiff);
3. (Name of plaintiff) did not know of the important fact; and,
4. Because (name of plaintiff) did not know the important fact, (name of plaintiff) (acted/did not act) and was harmed.

If (name of plaintiff) proves all these things, you must find for (him/her/it); and then you must determine what amount of money to award (him/her/it) for the harm. If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Revised March 7, 2014

Notes on Use

The committee strongly advises that during the charge conference the parties specify the disputed facts that may impose a duty on the defendant, and specify the important fact(s) the plaintiff says should have been disclosed.

Use this instruction in actions for concealment and suppression. The instruction combines APJI 18.05 and 18.06 (3d ed. 2013) to address the concern raised in *CNH America, LLC v. Ligon Capital, LLC*, 160 So. 3d 1195, 1210 (Ala. 2013). It follows

the directive in *Ex parte BASF Const. Chemicals, LLC*, 153 So. 3d 793 (Ala. 2013) that whether the defendant owes a duty is a shared responsibility between the trial judge and the jury when the facts that form the basis of a duty are disputed. Thus, the trial judge determines, as a matter of law, if these disputed facts, even if true, would impose on the defendant a duty to disclose. The jury then resolves the disputed issues of fact. If these facts are not sufficiently disputed, the trial judge decides whether the defendant owed a duty to disclose.

The elements of the claim of a claim for fraudulent suppression are: “(1) a duty on the part of the defendant to disclose facts; (2) concealment or non-disclosure of material facts by the defendant; (3) inducement of the plaintiff to act; and (4) action by the plaintiff to his or her injury.” CNH at *3 (quoting *Lambert v. Mail Handlers Ben. Plan*, 682 So. 2d 61, 63 (Ala. 1996)).

The instruction can be used when the existence of the duty to disclose requires the jury to resolve disputed issues of fact in addition to the disputed issue about whether the plaintiff knew the important fact. If the only disputed issue of fact about duty is whether the plaintiff knew about the concealed or suppressed fact, do not give the first element in the instruction.

Define important fact or promise, APJI 18.08, immediately after this instruction.

The evidence must show a duty or obligation on the defendant to disclose the material fact which the plaintiff claims the defendant suppressed. The duty or obligation to speak depends upon whether the plaintiff knew the fact, the fiduciary or other relationship of the parties, the value of the particular fact, the relative knowledge of the parties, and other circumstances of the case. In deciding whether the defendant was under an obligation to make known the important fact, the jury can consider the parties intelligence, educational background, experience, knowledge and power, and whether the defendant had knowledge, power or expertise not shared by the plaintiff.

References

Ala. Code § 6-5-102 (1975) (West’s Alabama Code).

Ex parte BASF Const. Chemicals, LLC, 153 So. 3d 793 (Ala. 2013) (slip and fall).

CNH America, LLC v. Ligon Capital, LLC, 160 So. 3d 1195, 1201-03 (Ala. 2013) (commercial case). In a commercial transaction involving arms length negotiations, the parties do not have any obligation to disclose any specific information to the other, but each has an affirmative duty to respond truthfully and accurately to direct questions from the other side. The disclosing party cannot be punished for fraudulent suppression unless the questioning party articulates with reasonable certainty the particular information it desires. Once a party elects to speak, he or she assumes a duty not to suppress or conceal those facts that materially qualify the facts already stated. He or she must make a full and fair disclosure without concealing any facts within his or her knowledge.

Freightliner, L.L.C. v. Whatley Contract Carriers, L.L.C., 932 So. 2d 883 (Ala. 2005).

State Farm Fire and Cas. Co. v. Owen, 729 So. 2d 834 (Ala. 1998).

Osborn v. Custom Truck Sales & Service, a Div. of Alley-Cassey Coal, Inc., 562 So. 2d 243, 12 U.C.C. Rep. Serv. 2d 664 (Ala. 1990).

Hall Motor Co. v. Furman, 285 Ala. 499, 234 So. 2d 37 (1970).

Brasher v. First Nat'l Bank, 232 Ala. 340, 168 So. 42 (1936).

Nat'l Park Bank of New York v. Louisville & N.R. Co., 199 Ala. 192, 74 So. 69 (1917).

Griel v. Lomax, 89 Ala. 420, 6 So. 741 (1889).

West's Key Number Digest, Fraud ¶16, 17.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 20.17 (5th ed. 2010).

Am. Jur. 2d, Fraud and Deceit §§ 200 to 234.

A.L.R. Library

Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 A.L.R.2d 1453.

**APJI 18.06 CONCEALMENT—OBLIGATION TO
MAKE KNOWN AS JURY ISSUE
[PL]**

Plaintiff (name of plaintiff) must prove to your reasonable satisfaction that Defendant (name of defendant) was under an obligation to make known the important fact to (name of plaintiff). In deciding whether (name of defendant) was under an obligation to make known the important fact, you can consider the parties (intelligence, educational background, experience, knowledge and power) and whether (name of defendant) had knowledge, power or expertise not shared by (name of plaintiff).

Notes on Use

Use this instruction only in cases when the existence of the duty to disclose depends on resolution of disputed factual issues and the court has determined, as a question of law, that there is substantial evidence of facts that would, if proven, rise to such duty. See Restatement (Second) of Torts, § 551 cmt. m stating as follows:

Court and jury. Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court. If there are disputed facts bearing upon the existence of the duty, as for example the defendant's knowledge of the fact, the other's ignorance of it or his opportunity to ascertain it, the customs of the particular trade, or the defendant's knowledge that the plaintiff reasonably expects him to make the disclosure, they are to be determined by the jury under appropriate instructions as to the existence of the duty.

When the relationship of the parties from which a duty to disclose arises is not a jury issue (generally where confidential or fiduciary relations are involved), Concealment APJI 18.05 should be given instead of this instruction.

In *State Farm Fire and Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998), the Supreme Court of Alabama held that "the existence of a duty is a question of law to be determined by the trial judge. Simply stated, the question of duty is a judgment whether the law

will impose responsibility on a party for its conduct toward another. . . . That judgment is at heart one that requires an analysis informed by precedent and principles. In other words, a duty analysis is inherently a legal analysis that entails an intellectual process of identifying, weighing, and balancing a number of competing factors—the existing law of the jurisdiction, the practicability of imposing a duty, the demands of justice, and the interests of society. That is an analysis our legal system recognizes is best undertaken by a judge.” The Court asserted that, in an action for fraudulent suppression, the judge should determine whether, assuming that the plaintiff’s factual assertions are true, they are sufficient to give rise to a legal duty to disclose. If the judge finds that the circumstances as alleged would be enough to create a legal duty, then the judge should instruct the jury as to what that duty would be if these circumstances did exist. The jury would then decide whether those circumstances actually existed. *State Farm Fire and Cas. Co. v. Owen*, 729 So. 2d 834, 841, 842 (Ala. 1998).

The holding of the Supreme Court of Alabama in *State Farm Fire and Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998) overruled the following cases: *Hopkins v. Lawyers Title Ins. Corp.*, 514 So. 2d 786 (Ala. 1986); *Lowder Realty, Inc. v. Odom*, 495 So. 2d 23 (Ala. 1986); *Jim Walter Homes, Inc. v. Waldrop*, 448 So. 2d 301 (Ala. 1983); and *Jim Short Ford Sales, Inc. v. Washington*, 384 So. 2d 83 (Ala. 1980).

References

State Farm Fire and Cas. Co. v. Owen, 729 So. 2d 834 (Ala. 1998).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 20.17 (5th ed. 2010).

APJI 18.07 PROMISSORY FRAUD [PL]

Plaintiff (name of plaintiff) says the defendant (name of defendant) promised (describe the promise) in the future. To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of defendant) made the promise;
2. That when (name of defendant) made the promise (he/she/it) intended to deceive (name of plaintiff) by not keeping the promise;
3. That (name of plaintiff) (acted/did not act) and was harmed.

If (name of plaintiff) proves all these things, you must find for (him/her/it) and then you must determine what amount of money to award (him/her/it) for the harm. If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Notes on Use

Use this instruction in conjunction with the appropriate instruction for the specific type of fraud when the material fact alleged is a promise to perform or to abstain from an act in the future. The instructions defining Important Fact/Promise (APJI 18.08) and Reliance (APJI 18.10) should be read immediately after this instruction, unless already given.

References

Benetton Services Corp. v. Benedot, Inc., 551 So. 2d 295, 9 U.C.C. Rep. Serv. 2d 1314 (Ala. 1989).

Padgett v. Hughes, 535 So. 2d 140, 142 (Ala. 1988). The elements of fraud are: (1) a false representation; (2) of a material existing fact; (3) reasonably relied upon by the plaintiff; (4) who suffered damage as a proximate consequence of the misrepresentation. To prevail on a promissory fraud claim, that is, one based upon a promise to act or not to act in the future, two ad-

ditional elements must be satisfied: (5) proof that at the time of the misrepresentation, the defendant had the intention not to perform the act promised; and (6) proof that the defendant had an intent to deceive.”

Jones v. The Village at Lake Martin, LLC, 256 So. 3d 119 (Ala. Civ. App. 2018).

West’s Key Number Digest, Fraud ⇨184.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 20.16 (5th ed. 2010).

Am. Jur. 2d, Fraud & Deceit § 86.

**APJI 18.08 DEFINITION OF IMPORTANT
FACT/PROMISE [PL]**

A (fact/promise) is important if it would cause plaintiff (name of plaintiff) to (act/not act). A (fact or promise) is important if the person who (represents/makes) it knows that the person to whom the (statement/promise) is made is likely to (act/not act).

Notes on Use

This instruction is to be preceded by the appropriate instruction for the specific type of fraud.

The Alabama cases on materiality are clear that a fact or promise must be material to support a fraud claim.

References

Alfa Mut. Ins. Co. v. Northington, 561 So. 2d 1041 (Ala. 1990). “Material” is defined as “facts . . . of such nature as to induce action on the part of another.”

Cooper v. Rowe, 208 Ala. 494, 94 So. 725 (1922).

West’s Key Number Digest, Fraud ☞11.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 20.10 (5th ed. 2010).

**APJI 18.09 OPINIONS AS STATEMENTS OF
FACT [PL]**

An opinion is a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value or similar matters. Ordinarily, an opinion is not considered a statement of fact. However, defendant (name of defendant)'s opinion is considered a statement of fact if plaintiff (name of plaintiff) proves that:

(Name of defendant) claimed to have special knowledge about the business at hand that (name of plaintiff) did not have; or

(Name of defendant) made a statement, not as a casual expression of belief, but in a way that assured that the statement is true; or

(Name of defendant) had a relationship of trust and confidence with (name of plaintiff); or

(Name of defendant) had some other special reason to expect that (name of plaintiff) would place full confidence in his or her opinion.

Notes on Use

This instruction should be read in conjunction with one of the elements instructions in APJI 18.01 to 18.05. Alternatives that do not apply to the facts of the case should be omitted.

References

BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So. 2d 203 (Ala. 2001).

Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997).

Fincher v. Robinson Bros. Lincoln-Mercury, Inc., 583 So. 2d 256, *Prod. Liab. Rep. (CCH) P 12911*, 15 U.C.C. Rep. Serv. 2d 1197 (Ala. 1991).

Reynolds v. Mitchell, 529 So. 2d 227 (Ala. 1988).

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APJI 18.09

American Pioneer Life Ins. Co. v. Sherrard, 477 So. 2d 287 (Ala. 1985).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 20.07 (5th ed. 2010).

Am. Jur. 2d, Fraud & Deceit § 69.

APJI 18.10 RELIANCE [PL]

A plaintiff suing for fraud must have reasonably relied on the important fact(s) by (acting/not acting) on the important fact(s). You must take into account all the circumstances that existed at the time in deciding if plaintiff (name of plaintiff) reasonably relied on the important fact(s). Among the circumstances you may consider are (see examples in Notes on Use and References).

Notes on Use

Use this instruction in cases filed after March 14, 1997, when the claim is based on false representation or suppression.

The court should instruct on the relevant circumstances suggested by substantial evidence. The references give examples of circumstances that are relevant in a particular fact situation. They are not inclusive or exclusive. This instruction does not define the descriptive terms or phrases, e. g., “the relative bargaining power of the parties.”

Torres v. State Farm Fire & Cas. Co., 438 So. 2d 757 (Ala. 1983) (overruled by, *Hickox v. Stover*, 551 So. 2d 259 (Ala. 1989)) solidified the reasonable reliance standard in Alabama. “If the circumstances are such that a reasonably prudent person who exercised ordinary care would have discovered the true facts, the plaintiff should not recover.” Citing *Bedwell Lumber Co., Inc. v. T & T Corp.*, 386 So. 2d 413, 415 (Ala. 1980).

Hickox v. Stover, 551 So. 2d 259 (Ala. 1989) (overruled by, *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997)), changed reliance standards to that of “justifiable reliance” by majority opinion. The majority quoted from *Southern States Ford, Inc. v. Proctor*, 541 So. 2d 1081, 1091–92 (Ala. 1989) (Hornsby, C.J., concurring specially): “Reliance should be assessed by the following standard: A plaintiff, given the particular facts of this knowledge, understanding, and present ability to fully comprehend the nature of the subject transaction and its ramifications, has not justifiably relied on the defendant’s representation if that representation is ‘one so patently and obviously false that he must have closed his eyes to avoid the discovery of the truth.’ ”

Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997) over-

ruled *Hickox v. Stover*, 551 So. 2d 259 (Ala. 1989) and it replaced the justifiable reliance standard with the reasonable reliance standard and it is applicable to fraud cases filed after March 14, 1997. The court stated,

After careful consideration, we conclude that the “justifiable reliance” standard adopted in *Hickox*, which eliminated the general duty on the part of a person to read the documents received in connection with a particular transaction (consumer or commercial), should be replaced with the “reasonable reliance” standard most closely associated with *Torres v. State Farm Fire & Casualty Co.*, 438 So.2d 757 (Ala.1983).

In *Foremost*, the Alabama Supreme Court stated that “a return to the ‘reasonable reliance’ standard will once again provide a mechanism, which was available before *Hickox*, whereby the trial court can enter a judgment as a matter of law in a fraud case where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction were fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms.”

The overruling of related Alabama cases, including *Harris v. M & S Toyota, Inc.*, 575 So. 2d 74 (Ala. 1991) and *Southern States Ford, Inc. v. Proctor*, 541 So. 2d 1081 (Ala. 1989), was recognized by *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1999-1 Trade Cas. (CCH) ¶ 72408 (M.D. Ala. 1997) (abrogated on other grounds by, *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 2002-2 Trade Cas. (CCH) ¶ 73814 (11th Cir. 2002)) and *Cunningham v. H.A.S., Inc.*, 74 F. Supp. 2d 1157 (M.D. Ala. 1999) and applies prospectively to all cases filed after March 14, 1997.

References

General.

Reasonable reliance is a necessary element of a claim for fraud. A party's failure to use some measure of precaution to safeguard his own interest precludes a claim for fraud. *Potomac Leasing Co. v. Bulger*, 531 So. 2d 307, 312 (Ala. 1988). When the circumstances are that a reasonably prudent person who used reasonable care would have discovered the facts, the plaintiff should not be able to prevail on a fraud claim. *Exxon Mobil Corp. v. Alabama Dept. of Conservation and Natural Resources*, 986 So. 2d 1093, 173 O.G.R. 312 (Ala. 2007); *Baker v. Metropolitan Life Ins. Co.*, 907 So. 2d 419, 420 (Ala. 2005); *Roper v. Associates Financial Services of Alabama, Inc.*, 533 So. 2d 206, 208 (Ala. 1988).

Seward v. Dickerson, 844 So. 2d 1207 (Ala. 2002).

Potter v. First Real Estate Co., Inc., 844 So. 2d 540 (Ala. 2002).

Winn v. Winn, 242 Ala. 324, 328, 6 So. 2d 401 (1942). The law does not presume bad faith or fraudulent conduct. Men are not charged with the duty of suspecting fraud when dealing with their fellows “in the absence of indicia of fraud, or unless the transaction is fraudulent per se.”

West’s Key Number Digest, Fraud ☞19 to 23, 46, 56, 58(4), 64(5), and 65(4).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 20.11, 20.11 [4] (5th ed. 2010).

W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 108 (justifiable reliance) (5th ed. 1984).

Am. Jur. 2d, Fraud and Deceit §§ 239 to 271 (2001).

Relevant circumstances.

The jury may consider circumstances such as mental capacity, education, relative sophistication and the bargaining power of the parties. Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997); Standard Furniture Mfg. Co., Inc. v. Reed, 572 So. 2d 389, 393 (Ala. 1990); Arkel Land Co. v. Cagle, 445 So. 2d 858, 861 (Ala. 1983) (farmer with a fifth-grade education did not understand legal significance and was entitled to rely on attorney whom he did not know to be representing the grantee); Torres v. State Farm Fire & Cas. Co., 438 So. 2d 757 (Ala. 1983); Southern Building & Loan Ass’n v. Dinsmore, 225 Ala. 550, 552–53, 144 So. 2d 1 (1932) (farmer with little or no experience in corporate stock was lulled into a feeling of security and into any neglect to read the certificate by the misrepresentations of the agent).

Special knowledge of the parties.

Ex parte ERA Marie McConnell Realty, Inc., 774 So. 2d 588, 591 (Ala. 2000) (“A purchaser’s ‘reliance is reasonable in the absence of independent knowledge sufficient to arouse the purchaser’s suspicion, and he is not obligated to make an independent investigation as to the truth of the seller’s representations absent such knowledge.’” (quoting Saranthus v. McIntyre, 557 So. 2d 1275, 1276 (Ala. Civ. App. 1989))); Standard Furniture Mfg. Co., Inc. v. Reed, 572 So. 2d 389, 393 (Ala. 1990) (plaintiff, a service manager of defendant, had no special knowledge of defendant’s

pension plan and was entitled to rely upon representation by the administrator of the plan); *Reynolds v. Mitchell*, 529 So. 2d 227, 231 (Ala. 1988) (“where the facts are not equally known to both sides, a statement of opinion by the one who knows the facts better, often involves a statement of a material fact that justifies his opinion, . . . therefore, in such a situation, an action for fraud may be predicated on an opinion, depending on whether the reliance on the representation of the opinion is reasonable.”); *Parker v. Ward*, 224 Ala. 80, 82, 139 So. 215 (1932) (“When the statement of a fact is assumed to be within the knowledge of the person making it, the other has the right to rely on its truth, and in the absence of anything to arouse suspicion is not bound to make inquiry or examine for himself.”); *Cartwright v. Braly*, 218 Ala. 49, 117 So. 477 (1928) (“The statement of opinion which is not his opinion, made to deceive and which does deceive, may, by reason of his peculiar knowledge of facts upon which a reliable opinion may be based and not accessible to the other party, amount to deceit.”).

A special relationship between the parties.

The following case was decided under the justifiable reliance standard, but these facts should also support reasonable reliance:

“Mrs. Thomas was 74 years old, a widow, and could barely read or write. She had known Earl Ledbetter for many years (Ledbetter had handled Mrs. Thomas’s late husband’s insurance needs), and she trusted him to provide a full-coverage policy. Ledbetter himself testified that he had a relationship of trust with Mrs. Thomas. Moreover, an Alfa vice president testified that an agent has a higher degree of responsibility to explain a policy when he is dealing with an illiterate person.” *Alfa Mut. Fire Ins. Co. v. Thomas*, 738 So. 2d 815, 820 (Ala. 1999).

“Special relationship” giving rise to a duty to disclose necessarily also gives the defrauded party a right to rely.

Courts have traditionally viewed the relationship between a bank and its customer as a creditor-debtor relationship that does not impose a fiduciary duty of disclosure on the bank. A fiduciary duty may arise when the customer reposes trust in a bank and relies on the bank for financial advice, or in other special circumstances. *Baylor v. Jordan*, 445 So. 2d 254 (Ala. 1984); *Bank of Red Bay v. King*, 482 So. 2d 274 (Ala. 1985).

The legal duty to communicate depends upon the existence of

a fiduciary relationship, or relation of trust or confidence between the parties, the value of a particular fact, the relative knowledge or inequality of condition of the parties, or other attendant circumstances. *Jim Walter Homes, Inc. v. Waldrop*, 448 So. 2d 301 (Ala. 1983), overruled on other grounds, *State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998).

Situations other than those involving fiduciary relationships may give rise to a duty to disclose, in that the “obligation to communicate may arise . . . from the particular circumstances of the case.” *Jim Short Ford Sales, Inc. v. Washington*, 384 So. 2d 83 (Ala. 1980), overruled on other grounds, *State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998).

“Where a relation of trust and confidence exists between the parties it is the duty of the party in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question, and any concealment of material facts by him is a fraud.” . . . Where confidential or fiduciary relations exist, which afford the power and means to one party to a transaction to take undue advantage of the other party, “and there is found the slightest trace of undue influence or unfair advantage redress will be given to the injured party.” *Brasher v. First Nat. Bank*, 232 Ala. 340, 168 So. 42, 46 (1936) (citations omitted).

Totality of the circumstances and the underlying nature of the transaction itself.

Mathis v. Jim Skinner Ford, Inc., 361 So. 2d 113, 115 (Ala. 1978) (“Purchasers have a right to assume that new automobiles will perform in accordance with reasonable expectations and in accordance with implied representations inherent in marketing such products.”), *cited in Chrysler Corp. v. Schiffer*, 736 So. 2d 538, 543, 40 U.C.C. Rep. Serv. 2d 516 (Ala. 1999) (opinion of Cook, J., with three Justices concurring and four Justices concurring in the result), and in *Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909 (Ala. 1994), overruled on other grounds, *State Farm Fire & Cas. Co. v. Owen*, 729 So. 2d 834 (Ala. 1998).

Arkel Land Co. v. Cagle, 445 So. 2d 858, 860 (Ala. 1983). When the representing party was an undisclosed agent for the other side in a contract.

Potter v. First Real Estate Co., Inc., 844 So. 2d 540 (Ala. 2002).

Independent Life and Acc. Ins. Co. v. Harrington, 658 So. 2d 892 (Ala. 1994).

FRAUD**APJI 18.10**

District 20, United Mine Workers of America v. Sams, 287 Ala. 312, 251 So. 2d 613, 77 L.R.R.M. (BNA) 3013, 66 Lab. Cas. (CCH) P 11943 (1971).

**APJI 18.11 DEFENSE—STATUTE OF
LIMITATIONS [PL]**

The law requires that (name of plaintiff) must have filed this lawsuit within two years of the fraud or within two years from when (name of plaintiff) discovered or should have reasonably discovered the fraud.

(Name of defendant) says (name of plaintiff) must have filed this lawsuit by (date) because (state the defendant's reason(s)). This lawsuit was filed (date).

(Name of defendant) must reasonably satisfy you from the evidence that (name of plaintiff) did not timely file this lawsuit. If (he/she/it) does, you must find for (name of defendant).

Revised Oct. 7, 2016

Notes on Use

Use this instruction in cases where the defendant pleads the defense of statute of limitations.

References

Ala. Code §§ 6-2-3 and 6-2-38(1) (1975) (West's Alabama Code).

Boros v. Palmer, 472 So. 2d 1020 (Ala. 1985).

Gonzales v. U-J Chevrolet Co., Inc., 451 So. 2d 244, 247 (Ala. 1984). "Fraud is deemed to have been discovered when the person either actually discovered, or when the person ought to or should have discovered, facts which would provoke inquiry by a person of ordinary prudence, and, by simple investigation of the facts, the fraud would have been discovered.

Cf. Ex parte Dow AgroSciences LLC, 299 So. 3d 952 (Ala. 2020) (discussing Ala. Code § 6-8-84 (1975) (West's Alabama Code) application to counterclaims and citing Romar Development Co., Inc. v. Gulf View Management Corp., 644 So. 2d 462 (Ala. 1994)).

West's Key Number Digest, Fraud ☞38.

FRAUD**APJI 18.11**

West's Key Number Digest, Limitation of Actions ☞41, 99, 100 (1) to (13), 104 (1) to (3).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 20.21 (5th ed. 2010).

APJI 18.12 FUTURE ACT [PL]

The plaintiff's fraud claim is based upon an alleged promise (to perform or abstain from) an act in the future. In order to recover, the plaintiff must reasonably satisfy you from the evidence that the promise was made, that at the time the promise was made the defendant did not intend to carry out the promise and that the defendant had a present intent to deceive.

Notes on Use

Use this instruction in conjunction with APJI 18.01 when the material fact alleged is a promise to perform or to abstain from an act in the future.

References

Benetton Services Corp. v. Benedot, Inc., 551 So. 2d 295, 9 U.C.C. Rep. Serv. 2d 1314 (Ala. 1989).

APJI 18.13 to 18.19**Reserved**

**APJI 18.20 FRAUDULENT TRANSFER—
PRESENT CREDITORS—ALA.
CODE § 8-9A-5 (1975) (WEST'S
ALABAMA CODE) [PL]**

Plaintiff (name of plaintiff) says (he/she/it) is a creditor of (name of debtor). (Name of plaintiff) says (name of debtor) fraudulently transferred an asset or interest in an asset when (he/she/it) transferred (describe the asset) to (name of transferee/insider).

(State the remedy the plaintiff seeks.)

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following things:

1. (Name of plaintiff) is a creditor of (name of debtor);
2. (Name of plaintiff)'s claim against (name of debtor) arose before (he/she/it) made the transfer; and,
3. (Name of debtor) transferred (describe the asset) to (name of transferee):
 - (a) Without receiving a reasonably equivalent value in exchange for the transfer; and
 - (b) (Name of debtor) was insolvent at the time or (name of debtor) became insolvent as a result of the transfer.

OR

- (a) The transfer was made to an insider (name of insider) for a preexisting debt; and,
- (b) (Name of debtor) was insolvent at the time and (name of insider) had reasonable cause to believe that (name of debtor) was insolvent.

If (name of plaintiff) proved all these things you must find that the transfer was fraudulent. If (name of plaintiff)

did not prove all these things you must find for (name of defendant).

Approved August 11, 2017

Notes on Use

The Alabama Uniform Fraudulent Transfer Act (AUFTA), Ala. Code §§ 8-9A-1 to 8-9A-12 (1975) (West's Alabama Code), applies to all transfers made after January 1, 1990. It may not apply to obligations. See Ala. Code § 8-9A-1, Comment 1. The AUFTA is neutral about obligations.

Use this instruction only when a present creditor claims under § 8-9A-5. Do not use this instruction when the claim arose after the transfer. Ala. Code § 8-9A-6 states when a transfer is made.

Ala. Code § 8-9A-1 and § 8-9A-2 state definitions that apply under the act.

The provisions that govern parties against whom judgment may be rendered and other remedies of the creditor are stated in § 8-9A-7 and § 8-9A-8.

Ala. Code § 8-9A-10 states:

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

APJI 18.23, Insolvency.

References

Thompson Properties 119 AA 370, Ltd. v. Birmingham Hide and Tallow Co., Inc., 897 So. 2d 248 (Ala. 2004).

Johns v. A.T. Stephens Enterprises, Inc., 815 So. 2d 511 (Ala. 2001). A plaintiff can recover compensatory and punitive damages under Ala. Code § 8-9A-7(a)(3)c (1975) (West's Alabama Code).

McPherson Oil Co., Inc. v. Massey, 643 So. 2d 595 (Ala. 1994).

Bank Independent v. Coats, 621 So. 2d 951 (Ala. 1993) (decided under old statutory scheme).

International Management Group, Inc. v. Bryant Bank, 274 So. 3d 1003 (Ala. Civ. App. 2018).

Holsombeck v. USAmeriBank, 264 So. 3d 91 (Ala. Civ. App. 2018), opinion modified on denial of rehearing.

Varner v. Varner, 662 So. 2d 273 (Ala. Civ. App. 1994).

See *In re Vista Bella, Inc.*, 511 B.R. 163 (Bankr. S.D. Ala. 2014) (discussing the test to determine “reasonably equivalent value” under 11 U.S.C.A. 548(a)(1)(B)).

West’s Key Number Digest, Fraudulent Conveyances ¶1 to 328.

Ally Windsor Howell, *Tilley’s Alabama Equity* §§ 11:1 to 11:12 (5th ed. Apr., 2017).

1 Michael L. Roberts, *Alabama Tort Law* § 20.22[2] (6th ed. 2015).

Am. Jur. 2d, *Fraudulent Conveyances and Transfers* §§ 25, 28.

**APJI 18.21 FRAUDULENT TRANSFER—
PRESENT AND FUTURE
CREDITORS—ALA. CODE § 8-9A-
4(c) (1975) (WEST’S ALABAMA
CODE) [PL]**

Plaintiff (name of plaintiff) says (he/she/it) is a creditor of (name of debtor). (Name of plaintiff) says (name of debtor) fraudulently transferred an asset or interest in an asset when (he/she/it) transferred (describe the asset) to (name of transferee).

(State the remedy plaintiff seeks.)

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following things:

1. (Name of plaintiff) is a creditor of (name of debtor);
2. (Name of debtor) transferred (describe the asset) to (name of transferee) without receiving a reasonably equivalent value in exchange for the transfer; and,
3. (Name of debtor) intended to incur, or believed or reasonably should have believed that (he/she/it) would incur debts beyond (his/her/its) ability to pay them as they became due.

OR

(Name of debtor) was engaged or was about to engage in a business transaction for which (his/her/its) remaining assets were unreasonably small in relationship to the business or transaction.

If (name of plaintiff) proved all these things you must find the transfer was fraudulent. If (he/she/it) did not prove these things, you must find for (name of defendant).

Approved August 11, 2017

Notes on Use

Use this instruction when the plaintiff brings the claim under Ala. Code § 8-9A-4(c) (1975) (West's Alabama Code).

This instruction applies whether or not the plaintiff was a creditor before the transfer. Ala. Code § 8-9A-6 states when a transfer is made.

Ala. Code § 8-9A-7 and § 8-9A-8 state the rules that govern parties against whom judgments may be rendered and other remedies of the creditor.

The Alabama Uniform Voidable Transactions Act, 2018 Ala. Acts 163, Ala. Code §§ 8-9B-1-16 (1975) (West's Alabama Code), became effective January 1, 2019, and it applies to transfers made on or after January 1, 2019 (§ 8-9B-16). The user may wish to read N. Christian Glenos & Cathleen C. Moore, *What's in a Name (Besides Centuries of Confusion)? The Alabama Uniform Voidable Transactions Act*, 80 Ala. Law 270 (July 2019).

The Committee has not drafted Plain Language instructions for the uniform act.

References

See APJI 18.20, References.

**APJI 18.22 FRAUDULENT TRANSFER—
ACTUAL INTENT TO DEFRAUD
CREDITORS—ALA. CODE § 8-9A-
4(a) (1975) (WEST’S ALABAMA
CODE) [PL]**

Plaintiff (name of plaintiff) says (he/she/it) is a creditor of (name of debtor). (Name of plaintiff) says (name of debtor) fraudulently transferred an asset or an interest in an asset when (he/she/it) transferred (describe the asset) to (name of transferee).

(State the remedy the plaintiff seeks.)

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following things:

1. (Name of plaintiff) is a creditor of (name of debtor); and,
2. When (name of debtor) transferred (describe the asset) (he/she/it) intended to hinder, delay or defraud (name of plaintiff) or any other creditor of (name of debtor) from collecting the debt.

If (name of plaintiff) proved these things, you must find the transfer was fraudulent. If (name of plaintiff) did not prove these things, you must find for (name of defendant).

When you determine whether or not (name of debtor) transferred (describe the asset) with the actual intent to hinder, delay or defraud, you may consider the following factors:

(The transfer was made to an insider.)

((Name of debtor) kept possession or control of the property after the transfer.)

(The transfer was disclosed or concealed.)

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((Name of debtor) had been sued or threatened with suit before (he/she/it) transferred the property.)

((The transfer was substantially all of (name of debtor)'s assets.)

((Name of debtor) secretly left the area.)

((Name of debtor) removed or concealed assets.)

((The value received by (name of debtor) was reasonably equivalent to the value of the asset transferred.)

((Name of debtor) was insolvent or became insolvent shortly after (he/she/it) transferred the asset.)

((The transfer occurred shortly before or shortly after (name of debtor) incurred a substantial debt.)

((Name of debtor) transferred the essential assets of the business to a (name the lienor) who transferred the assets to an insider of (name of debtor).)

Any other factor you find important to determine this issue.

Approved August 11, 2017

Notes on Use

Use this instruction when the plaintiff files the claim under Ala. Code § 8-9A-4(a) (1975) (West's Alabama Code). This section governs transfers made with actual intent to hinder, delay, or defraud present and future creditors.

See notes on use under APJI 18.20 and 18.21.

References

See APJI 18.20, References.

Peacock Timber Transport, Inc. v. B.P. Holdings, LLC, 115 So. 3d 914 (Ala. 2012).

Thompson Properties 119 AA 370, *Ltd. v. Birmingham Hide and Tallow Co., Inc.*, 897 So. 2d 248 (Ala. 2004).

Hart v. Pugh, 878 So. 2d 1150 (Ala. 2003).

Folmar & Associates LLP v. Holberg, 776 So. 2d 112 (Ala. 2000), overruled on other grounds, *White Sands Group, L.L.C. v. PRS II, LLC*, 32 So. 3d 5 (Ala. 2009).

McPherson Oil Co., Inc. v. Massey, 643 So. 2d 595 (Ala. 1994).

Bank Independent v. Coats, 621 So. 2d 951 (Ala. 1993) (decided under old statutory scheme).

International Management Group, Inc. v. Bryant Bank, 274 So. 3d 1003 (Ala. Civ. App. 2018).

Varner v. Varner, 662 So. 2d 273 (Ala. Civ. App. 1994).

See *In re Vista Bella, Inc.*, 511 B.R. 163 (Bankr. S.D. Ala. 2014) (discussing the test to determine “reasonably equivalent value” under 11 U.S.C.A. 548(a)(1)(B)).

West’s Key Number Digest, *Fraudulent Conveyances* ¶1 to 328.

¹ Michael L. Roberts, *Alabama Tort Law* § 20.22[2] (6th ed. 2015).

Am. Jur. 2d, Fraudulent Conveyances and Transfers §§ 36, 188.

**APJI 18.23 FRAUDULENT TRANSFER—
INSOLVENCY—ALA. CODE § 8-9A-2
(1975) (WEST'S ALABAMA CODE)
[PL]**

Debtor's debts exceed value of assets.

(Name of debtor) was insolvent if the sum of (his/her/its) debts is greater than the sum of the value of all (name of debtor)'s assets. You must use a fair method to value (name of debtor)'s assets.

Debtor not paying debts as they become due.

If (name of debtor) was not generally paying (his/her/its) debts as they become due, this is evidence that (name of debtor) was insolvent.

Partnership.

To determine whether the partnership is solvent, follow these steps:

1. Determine the value of the partnership's assets at a fair valuation;

2. Determine the value of the partnership's debts at a fair valuation;

3. If the partnership assets in Step 1 exceed the partnership debts in Step 2, then the partnership is solvent, you will so find, and your deliberation on this issue will be finished.

4. If the partnership assets in Step 1 do not exceed the partnership debts in Step 2, then you will proceed to follow these additional steps for (the/each) general partner (and you will repeat these steps for every one of the general partners (name them) separately):

A. Determine the value of the general partner's non-partnership assets at a fair valuation;

B. Determine the value of the general partner's non-partnership debts at a fair valuation;

C. If the general partner's non-partnership assets are greater than (his/her/its) non-partnership debts, then subtract those debts from those assets and add the difference to your figure in Step 1.

D. If the general partner's non-partnership assets do not exceed (his/her/its) non-partnership debts, then disregard (his/her/its) non-partnership assets and debts entirely.

5. After you have completed steps A, B, C, and D for (the general partner/each general partner separately), if your figure in Step 1, plus any sum(s), if any, you have added from Steps A, B, and C, is greater than the partnership debts you determined in Step 2, then the partnership is solvent; but otherwise it is insolvent.

Approved September 21, 2017

Notes on Use

This instruction is based on Ala. Code § 8-9A-2 (1975) (West's Alabama Code).

Ala. Code § 8-9A-2(b) states a presumption but does not state it is conclusive. This instruction is written as an administrative presumption that shifts the burden of going forward with the evidence.

The usefulness of this instruction may be short-lived, because, as of the date of this publication, the Alabama Law Institute will recommend to the 2018 Alabama Legislature that it amend the underlying statute, Alabama Code Section 8-9A-2(c), as part of a set of amendments to conform the Alabama Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act and to adopt that name. The pertinent amendment would eliminate the special insolvency definition applicable to partnerships presently contained in Section 8-9A-2(c).

The Committee published this instruction because there is no way to predict when or if the Legislature will adopt the amend-

ments or what provisions the amendments would ultimately include. Therefore, the Committee recommends that judges and lawyers check the state of the law before using this instruction.

Ala. Code 8-9A-2(d) & (e) list assets and obligations that are excluded from the determination about whether or not the debtor was insolvent.

References

See APJI 18.20, References.

West's Key Number Digest, Fraudulent Conveyances ¶1 to 328.

Am. Jur. 2d, Fraudulent Conveyances and Transfers §§ 18 to 24, 178.

**APJI 18.24 FRAUDULENT TRANSFER—
VALUE—DEFINED—ALA. CODE § 8-
9A-3 (1975) (WEST’S ALABAMA
CODE) [PL]****Value.**

Value is given for a transfer if, in exchange for the transfer, property is transferred or the debtor’s preexisting debt is secured or satisfied.

Value does not include the transferee’s unperformed promise to furnish support to the debtor or another person if the promise was made otherwise than in the ordinary course of the transferee’s business.

Reasonably equivalent value given under foreclosure or power of sale.

A person gives a reasonably equivalent value if the person gets the debtor’s interest in an asset when it is transferred through a regularly conducted, noncollusive foreclosure sale under a mortgage, deed of trust, or security agreement.

A person gives reasonably equivalent value when the person gets the debtor’s interest in an asset when it is transferred through a regularly conducted, noncollusive execution of a power of sale in a mortgage, deed of trust, or security agreement.

Present value.

A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

Approved August 11, 2017

Notes on Use

This instruction is based on Ala. Code § 8-9A-3 (1975) (West's Alabama Code).

References

1. Michael L. Roberts, Alabama Tort Law § 20.22[2] (6th ed. 2015).

**APJI 18.25 FRAUDULENT TRANSFER—
TRANSFeree—DEFENSES—ALA.
CODE § 8-9A-3 (1975) (WEST’S
ALABAMA CODE) [PL]**

A transfer is not voidable against a person who took in good faith for a reasonably equivalent value.

A transfer is not voidable against any subsequent transferee or obligee who took in good faith.

Approved August 11, 2017

Notes on Use

Ala. Code § 8-9A-8 (1975) (West’s Alabama Code) states additional defenses of the transferee under particular fact situations.

References

Harper v. Raisin Fertilizer Co., 158 Ala. 329, 48 So. 589 (1908). At common law the transferee could raise any defense the debtor could raise so long as the defense was not personal to the debtor.

West’s Key Number Digest, Fraudulent Conveyances ☞1 to 328.

1 Michael L. Roberts, Alabama Tort Law § 20.22[2] (6th ed. 2015).

Chapter 19

Wrongful Garnishment [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

APJI 19.00 Wrongful Garnishment—Post Judgment [PL]
APJI 19.01 Garnishment Issued in Aid of Pending Suit—Claim
Against Principal and Surety [PL]

Title of Instruction	Date Approved	Prior Instruction Number
19.00 Wrongful Garnishment—Post Judgment [PL]	2/6/15	New
19.01 Garnishment Issued in Aid of Pending Suit—Claim Against Prin- cipal and Surety [PL]	2/6/15	19.01

**APJI 19.00 WRONGFUL GARNISHMENT—
POST JUDGMENT [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) wrongfully issued a garnishment against (name of plaintiff)'s (wages) (property). (Name of plaintiff) says the garnishment was wrongfully issued because (state the reason).

A garnishment is a process issued by a court to help a (person/company) collect a debt. The garnishment is against a third party whom the creditor believes has possession or control of money or property that belongs to the debtor. For example, part of a debtor's pay check can be garnished to pay the debt, and the garnishment is issued against the debtor's employer to withhold part of the salary and pay it into court. In this example, the employer is called the garnishee.

To have a garnishment issued, (name of defendant) or (his/her/its) agent or lawyer had to file a sworn statement that stated three things.

1. The amount of (money) (name of plaintiff) owed (name of defendant);
2. That (name of defendant) believed it was necessary to issue the garnishment to satisfy the debt; and,
3. That (name of defendant) believed (name of garnishee) had money or property in (his/her/its) possession that could be garnished.

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence that:

((He/she/it) did not owe (name of defendant) a debt.) or,

(It was not necessary for (name of defendant) to issue the garnishment to satisfy the debt.)

If (name of plaintiff) proved one of these, you must find

for (him/her/it), and then you must determine how much money to award (name of plaintiff).

If (name of plaintiff) did not prove one of these, you must find for (name of defendant).

Approved February 6, 2015

Notes on Use

This instruction is new. The existing instructions did not instruct on a post-judgment garnishment. This instruction is written to conform to language in Ala. Code § 6-6-391 (1975) (West's Alabama Code).

APJI 19.01 instructs on wrongful garnishment issued to aid a pending lawsuit.

References

Ex parte Avery, 514 So. 2d 1380 (Ala. 1987) (states the purpose of the exemption laws).

Brown v. Moore, 487 So. 2d 882, 883 (Ala. 1986).

Alabama Power Co. v. Emigh, 429 So. 2d 952 (Ala. 1983).

Skillman v. First State Bank of Altoona, 341 So. 2d 691 (Ala. 1977).

Tarver v. Household Finance Corp., 47 Ala. App. 273, 253 So. 2d 333 (Civ. App. 1971).

Martin v. Steakley, 39 Ala. App. 578, 106 So. 2d 173 (1958).

Ala. Code § 5-19-15 (1975) (West's Alabama Code).

Ala. Code §§ 6-6-370 to 484 (1975) (West's Alabama Code).

Ala. Code §§ 6-10-6, 6-10-7, 6-10-37 (1975) (West's Alabama Code).

West's Key Number Digest, Attachment ⌘355 to 384.

West's Key Number Digest, Garnishment ⌘10, 244, 248 to 251.

APJI 19.00**ALABAMA PATTERN JURY INSTRUCTIONS**

West's Key Number Digest, Malicious Prosecution ¶25.

Jenelle Mims Marsh, *Alabama Law of Damages* § 13:23 (6th ed. 2012).

Ala. R. Civ. P. 64A.

Ala. R. Civ. P. 69.

Am. Jur. 2d, Attachment and Garnishment § 566, 597.

Comment: Garnishment in Alabama, Ala. L. Rev. 649, 677 (1978).

John V. Lee, *Garnishments in Alabama*, Supreme Court of Alabama Law Library JUD0399.

**APJI 19.01 GARNISHMENT ISSUED IN AID OF
PENDING SUIT—CLAIM AGAINST
PRINCIPAL AND SURETY [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) wrongfully issued a garnishment against (name of plaintiff)'s (wages) (property). (He/she/it) further says (name of defendant), issued the garnishment in a lawsuit (name of defendant) had against (name of plaintiff). Plaintiff says defendant (name of surety) issued a garnishment bond to (name of defendant), and because the garnishment was wrongful, (name of surety) is liable on the bond.

(Name of plaintiff) says the garnishment was wrongfully issued because (state the reason).

A garnishment is a process issued by a court to help a (person/company) collect a debt. The garnishment is against a third party whom the creditor believes has possession or control of money or property that belongs to the debtor. For example, part of a debtor's pay check can be garnished to pay the debt, and the garnishment is issued against the debtor's employer to withhold part of the salary and pay it into court. In this example, the employer is called the garnishee.

The garnishment can be issued at the same time a party is suing another party, and it is issued to aid in the collection of any judgment the plaintiff wins against the defendant. However, in this case, extraordinary circumstances must exist before the garnishment can issue.

To have a garnishment issued, (name of defendant) or (his/her/its) agent or lawyer had to file a sworn statement that stated three things.

1. The amount of (money) (name of defendant) demanded from (name of plaintiff) in the lawsuit,
2. That (name of defendant) believed it was necessary to issue the garnishment to satisfy the demand; and,

3. That (name of defendant) believed (name of garnishee) had money or property in (his/her/its) possession that could be garnished.

In addition to filing the sworn statement, (name of defendant) had to file a bond with sureties, in double the amount (name of defendant) was suing (name of plaintiff) for in the lawsuit. And, the bond had to be conditioned that (name of defendant) would prosecute the garnishment to effect and pay (name of plaintiff) all damages as (he/she) may sustain from the wrongful or vexatious suing on the garnishment. (Name of surety) issued the bond.

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence that:

((He/she/it) did not owe (name of defendant) what (he/she/it) demanded in the lawsuit.) or,

(It was not necessary for (name of defendant) to issue the garnishment to satisfy the debt.)

If (name of plaintiff) proves one of these, you must find for (him/her/it), and then you must determine how much money to award (name of plaintiff).

If (name of plaintiff) did not prove either of these, you must find for (name of defendant).

If you find for (name of plaintiff) you will award (him/her/it) compensatory damages. The types of compensatory damages you can award are (state the types and give the appropriate instruction on each). If you find that (name of defendant)'s conduct was (malicious) (vexatious) in having the garnishment issued, you may award punitive damages.

No matter what you award, the award cannot be more than the amount of the garnishment bond of \$_____._____.

Approved February 6, 2015

Notes on Use

This instruction rewrites APJI 19.01 (2014 ed.) in Plain Language. It must be modified if the claim is against the principal only.

Pre-judgment garnishment cannot be used unless there is a showing that such garnishment is necessary because of extraordinary circumstances. It is unclear if pre-judgment garnishment is utilized since the decision in *McMeans v. Schwartz*, 330 F. Supp. 1397 (S.D. Ala. 1971).

The bench and bar should be aware that although prior opinions hold that vexatious conduct will support punitive damages, the user should consult Ala. Code § 6-11-20 (1975) (West's Alabama Code) and determine whether the statute controls punitive damages in a wrongful garnishment case.

References

Liversage v. Gibson, 222 Ala. 672, 133 So. 715 (1931).

Ala. R. Civ. P. 64A.

See references in APJI 19.00.

Chapter 20

Insurance [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

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- APJI 20.22 Misrepresentation by Insured After Loss—Value of Property—Affirmative Defense [PL]
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- APJI 20.24 Suicide—Presumptions [PL]
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- APJI 20.27 Death Certificate—Prima Facie Evidence [PL]
- APJI 20.28 Negligent Failure to Obtain Insurance [PL]
- APJI 20.29 Accident Policy—Burden of Proof [PL]
- APJI 20.30 Accident Policy—Definitions [PL]
- APJI 20.31 Accident Policy—Violation of Law [PL]
- APJI 20.32 Accident Policy—Insured’s Voluntary Act [PL]
- APJI 20.33 Accidental Death Policy—Insured as Aggressor [PL]
- APJI 20.34 Accident Policy—Insured Participating in an Assault [PL]
- APJI 20.35 Accident Policy—Loss Caused by Disease [PL]
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- APJI 20.48 to 20.49 Reserved
- APJI 20.50 Uninsured Motorist—Elements [PL]
- APJI 20.51 Uninsured Motorist—Elements—Uninsured Motorist and Carrier Are Parties [PL]
- APJI 20.52 Underinsured Motorist—Elements—Carrier is Only Party [PL]
- APJI 20.53 Underinsured Motorist—Elements—Underinsured Motorist and Carrier Are Parties [PL]
- APJI 20.54 Uninsured Motorist—Hit-and-Run/Phantom Vehicle [PL]
- APJI 20.55 Cases Involving Either a Cross-Claim or Third Party Claim by the Underinsured/Uninsured Motorist Carrier Against the Tortfeasor [PL]

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APJI 20.43 Bad Faith—Evidence Considered	5/10/13	NEW
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Title of Instruction	Date Approved	Prior Instruction Number
APJI 20.51 Uninsured Motorist— Elements—Uninsured Motorist and Carrier Are Parties	6/7/13	20.54–20.55
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APJI 20.00 INTRODUCTION—ISSUES [PL]

Insurance is an agreement that the insurance company, in exchange for a premium, agrees to pay a party called the insured or a party named by the insured, an agreed amount for a specific loss as the result of a specified event.

Plaintiff (name of plaintiff) says that defendant (name of defendant) sold a (name type) insurance policy to (name of plaintiff).

(1. (Name of plaintiff) says that (he/she/it) and (name of defendant) had an agreement and that (name of defendant) should have paid the (type of coverage claim). This claim is for breach of an insurance contract.)

(2. (Name of plaintiff) says that (name of defendant) acted in bad faith in not paying the policy benefits. This claim is for bad faith failure to pay.)

(3. (Name of plaintiff) says if it is determined that there was no insurance, that (name of defendant) (negligently/wantonly) failed to procure insurance for (name of plaintiff). This claim is for (negligent/wanton) failure to procure.).

(Name of defendant) denies that these claims are true.

I will now explain each of (name of plaintiff)'s claims and the defenses raised by (name of defendant). You must decide each claim separately.

Approved October 5, 2012

Notes on Use

Use this introductory instruction and follow it with applicable specific instructions. The introductory instruction should be altered to the circumstances of each case. Types of insurance include, but are not limited to, life, health, medical, liability, automobile, gap, disability, burial, property, accident, casualty or indemnity.

References

Bibb Allen, *Allen’s Alabama Liability Insurance Handbook* (2d ed. 2008).

**APJI 20.01 ELEMENTS OF AN INSURANCE
CONTRACT [PL]**

To establish there was an insurance contract, plaintiff (name of plaintiff) must prove to your reasonable satisfaction that the parties agreed to all of the following:

1. The identity of the (person/property) being insured;
2. The time the insurance begins and when it ends or how long it is to continue;
3. The risk(s) against which the (person/property) is being insured;
4. The premium to be paid for the insurance;
5. The amount to be paid in the event of loss; and
6. (Any other element, term or condition that may be peculiar to the particular insurance contract).

There is no insurance contract unless the parties agreed to all these elements. It does not matter what their negotiations and proposals were if there was no agreement.

Approved October 5, 2012

Notes on Use

Use this instruction when there is a question whether the application was accepted by the insurer, whether the policy was issued or whether the policy became effective before the date of the loss.

Mutual Assent is defined in APJI 10.05.

References

Mobile Airport Authority v. HealthSTRATEGIES, Inc., 886 So. 2d 773, 779 (Ala. 2004). “An insurance contract, like all other contracts, requires an offer, acceptance of that offer, consideration,

and mutual assent to terms essential to the formation of the contract. The existence of a contract is determined by reference to the reasonable meaning of the parties' external and objective manifestations of mutual assent, rather than by their uncommunicated beliefs."

Schoepflin v. Tender Loving Care Corp., 631 So. 2d 909, 911 (Ala. 1993). "A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. The party agreeing to make the compensation is usually called the 'insurer' or 'underwriter'; the other, the 'insured' or 'assured'; the agreed consideration, the 'premium'; the written contract, a 'policy'; the events insured against, 'risks' or 'perils'; and the subject, right, or interest to be protected, the 'insurable interest.' A contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event and is applicable only to some contingency or act to occur in [the] future. An agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to [the] other party upon destruction, loss, or injury of something in which [the] other party has an interest."

Strength v. Alabama Dept. of Finance, Div. of Risk Management, 622 So. 2d 1283 (Ala. 1993).

Life Ins. Co. of Georgia v. Miller, 292 Ala. 525, 296 So. 2d 900 (1974).

United Ins. Co. of America v. Headrick, 275 Ala. 594, 157 So. 2d 19 (1963).

West's Key Number Digest, Insurance ☞1768, 1720 to 1741.

Bibb Allen, *Allen's Alabama Liability Insurance Handbook* § 1.01 (2d ed. 2008).

Ala. Code (1975) § 27-1-2(1) (West's Alabama Code) (defines insurance as a contract whereby one undertakes to indemnify another or pay or provide a specified amount or benefit upon determinable contingencies).

Black's Law Dictionary p. 814 (8th ed. 2004).

Am.Jur.2d Insurance § 1.

**APJI 20.02 APPLICATION IS AN OFFER FOR
AN INSURANCE CONTRACT [PL]**

An application for insurance is not a contract; it is an offer to enter into an insurance contract. The offer does not become an insurance contract unless the insurance company accepts the offer on the terms stated in the application.

Approved October 5, 2012

Notes on Use

Use this instruction when there is a question whether the application was accepted by the insurer, whether the policy was issued or whether the policy became effective before the date of the loss.

References

Mobile Airport Authority v. HealthSTRATEGIES, Inc., 886 So. 2d 773, 779 (Ala. 2004). “An application for insurance is merely an offer on the part of the applicant to purchase insurance. The acceptance of such an offer must be signified by some act or acts agreed upon by the parties, or from which the law raises the presumption of acceptance.”

Gray v. Great American Reserve Ins. Co., 495 So. 2d 602 (Ala. 1986).

McGhee v. Paramount Life Ins. Co., 385 So. 2d 969 (Ala. 1980).

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So.2d 143 (1975).

Life Ins. Co. of Georgia v. Miller, 292 Ala. 525, 296 So. 2d 900 (1974).

United Ins. Co. of America v. Headrick, 275 Ala. 594, 157 So. 2d 19 (1963).

West’s Key Number Digest, Insurance ☞1732.

Bibb Allen, *Allen’s Alabama Liability Insurance Handbook* §§ 2.03, 2.12 (2d ed. 2008).

APJI 20.03 COUNTEROFFER [PL]

If the policy issued is materially different from the policy applied for, the issued policy is a rejection of the proposal in the application. The materially different policy is a counteroffer which becomes a binding insurance contract if accepted by the applicant.

Approved October 5, 2012

Notes on Use

Use this instruction when the insurance company issued a policy that is materially different from the terms in the application such as when the amount of coverage is less, a portion of the coverage is not written, the period of the policy is different or the premium rate is increased.

See APJI 20.07, Delivery of Policy.

References

Southern Foodservice Management, Inc. v. American Fidelity Assur. Co., 850 So. 2d 316 (Ala. 2002).

Ex parte Southern United Fire Ins. Co., 843 So. 2d 151 (Ala. 2002).

American Bankers Ins. Co. of Florida v. Crawford, 757 So. 2d 1125, 1130 (Ala. 1999). “An application for insurance is an offer to enter into an insurance contract, and if the insurer issues a policy materially different from that applied for, the policy is a counteroffer which becomes binding only when accepted by the applicant.”

Ex parte Rager, 712 So. 2d 333 (Ala. 1998).

Liberty Nat. Life Ins. Co. v. Smith, 356 So. 2d 646 (Ala. 1978).

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So. 2d 143 (1975).

Life Ins. Co. of Georgia v. Miller, 292 Ala. 525, 296 So. 2d 900 (1974).

West’s Key Number Digest, Insurance ☞1740.

APJI 20.03**ALABAMA PATTERN JURY INSTRUCTIONS**

Bibb Allen, *Allen's Alabama Liability Insurance Handbook*
§ 1.01 (2d ed. 2008).

**APJI 20.04 MATERIALLY DIFFERENT POLICY
[PL]**

If defendant (name of defendant) issues a policy materially different from the policy that plaintiff (name of plaintiff) applied for, and if (name of defendant) acted unreasonably in issuing the different policy, then the application controls the terms of the policy.

Approved January 11, 2013

Notes on Use

Use this instruction if the defendant says the policy issued is a counteroffer and the plaintiff claims the insurance company acted unreasonably when it issued a materially different policy.

The actions of the insurance company may be unreasonable if: it up-rated the policy; the agent was negligent when he or she completed the application; the company delayed issuing the policy; the company concluded that the applicant could not make the premium payments; or the insurance company's officers refused to form an opinion about the applicant's insurability until after the applicant died.

Caveat: The user should note that there may be an argument whether the duty to read documents reaffirmed in *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997) affects the insured's ability to successfully rely on the doctrine of estoppel. Cf., *Alfa Life Ins. Corp. v. Reese*, 185 So. 3d 1091 (Ala. 2015). Cf., *Alfa Life Ins. Corp. v. Colza*, 159 So. 3d 1240 (Ala. 2014).

References

Connell v. State Farm Mut. Auto. Ins. Co., 482 So. 2d 1165 (Ala. 1985).

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So. 2d 143 (1975), answer conformed to 530 F.2d 98 (5th Cir. 1976) (insurer was estopped from asserting that materially different policy was a counteroffer because its agent negligently failed to inform insurer that the insured requested a double indemnity accident policy).

Life Ins. Co. of Georgia v. Miller, 292 Ala. 525, 531, 296 So. 2d 900, 905 (1974). “Since the company’s action in up-rating the policy was not justified either by the underwriting rule as construed by this court, or, indeed, as apparently construed by the company itself, the up-rating decision was clearly an arbitrary one and the policy must be read as being made without taking the arbitrary act of the underwriter into account . . . Thus, where the decision to up-rate was unreasonable and arbitrary, it follows that the court will disregard it in construing the policy.”

West’s Key Number Digest, Insurance ⌘1987.

Bibb Allen, Allen’s Alabama Liability Handbook § 2.09 (2d ed. 2008).

**APJI 20.05 TEST WHEN CONSTRUING
AMBIGUOUS INSURANCE POLICY
[PL]**

The language used in an insurance policy is written by the insurance company. You must strictly interpret the language in the policy against the insurance company and liberally in favor of the insured.

When terms conflict, or might have different meanings, or are unclear, you must consider the other evidence and testimony in this case about the intent of the parties. In deciding intent, you may consider the usual and ordinary meaning of the language used in the insurance policy, the relationship of the parties, what they said and what they did, and all the circumstances surrounding the making of the insurance policy. Words in a policy have their usual and ordinary meaning unless you decide that the parties intended the words to mean something else. In deciding what the words of a policy meant to the parties, you should consider the whole contract, not just parts of it. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

These principles should also be used in construing other documents prepared and used by the insurance company that affect the insurance policy.

Approved November 9, 2012

Notes on Use

Use this instruction when the insurance contract is ambiguous and the jury must construe the contract of insurance, ambiguous provisions of the policy, or other documents used by the insurance company that affect the policy issued.

When a term or provision in an insurance contract is reasonably susceptible to more than one meaning, it is ambiguous. An ambiguity exists when good arguments can be made for either of

two contrary positions about the meaning of the term or provision in the policy. *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 308-09 (Ala. 1999); *FabArc Steel Supply, Inc. v. Composite Const. Systems, Inc.*, 914 So. 2d 344, 357 (Ala. 2005). “Unless the language of the policy is fairly and reasonably susceptible to more than one construction, there is no basis for interpretation.” *United Services Auto. Ass’n v. Smith*, 57 Ala. App. 506, 510, 329 So. 2d 562, 565 (Civ. App. 1976). Whether an insurance policy is ambiguous is a question of law for the trial court to decide. *Alfa Life Ins. Corp. v. Johnson*, 822 So. 2d 400 (Ala. 2001); *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 1999); *Garrett v. Alfa Mut. Ins. Co.*, 584 So. 2d 1327 (Ala. 1991); *Continental Elec. Co. v. American Employers’ Ins. Co.*, 518 So. 2d 83 (Ala. 1987). If the trial court determines there is no ambiguity, it must determine the force and effect of the terms of the insurance contract as a matter of law. However, if the trial court finds the insurance contract is ambiguous, it must employ established rules of contract construction to resolve the ambiguity. *Alfa Life Ins. Corp. v. Johnson*, 822 So. 2d 400 (Ala. 2001).

If the application of such rules is not sufficient to resolve the ambiguity, factual issues arise which must be decided by the jury. *Alfa Life Ins. Corp. v. Johnson*, 822 So. 2d 400 (Ala. 2001). If one must go beyond the four corners of the agreement in construing an ambiguous agreement, the surrounding circumstances, including the practical construction put on the language of the agreement by the parties to the agreement, are controlling in resolving the ambiguity. Where factual issues arise, the resolution of the ambiguity becomes a task for the jury. *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 1999); *E & S Facilities, Inc. v. Precision Chipper Corp.*, 565 So. 2d 54 (Ala. 1990).

References

Alfa Life Ins. Corp. v. Johnson, 822 So. 2d 400 (Ala. 2001).

Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co., 817 So. 2d 687 (Ala. 2001).

State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293 (Ala. 1999).

Garrett v. Alfa Mut. Ins. Co., 584 So. 2d 1327 (Ala. 1991).

Amerisure Ins. Cos. v. Allstate Ins. Co., 582 So. 2d 1100 (Ala. 1991).

E & S Facilities, Inc. v. Precision Chipper Corp., 565 So. 2d 54 (Ala. 1990).

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Continental Elec. Co. v. American Employers' Ins. Co., 518 So. 2d 83 (Ala. 1987).

Burnham Shoes, Inc. v. West American Ins. Co., 504 So. 2d 238 (Ala. 1987), abrogated in part, Williamson v. Indianapolis Life Ins. Co., 741 So. 2d 1057 (Ala. 1999).

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So. 2d 143 (1975).

West's Key Number Digest, Contracts ⇨95; Insurance ⇨1805 to 1863.

Bibb Allen, Alabama Liability Insurance Handbook §§ 3.05, 3.06 (2d ed. 2008).

Am. Jur. 2d Contracts §§ 329, 351, 354.

Am. Jur. 2d Insurance §§ 293 to 311.

APJI 20.06 CONDITIONS OF POLICY [PL]

The policy may contain certain conditions for coverage which must be satisfied. If the conditions are not met, the policy will not be effective.

Approved October 5, 2012

Notes on Use

Use this instruction when the insurance company claims conditions in the policy have not been complied with.

References

Carraway Methodist Health Sys. v. Wise, 986 So. 2d 387 (Ala. 2007).

Ex parte Payne, 741 So. 2d 398, 403 (Ala. 1999). “In negotiating a contract parties may impose any condition precedent, the performance of which is essential before they become bound by an agreement; in other words, there may be a condition precedent to the existence of a contract. Accordingly, where parties to a proposed contract have agreed that a contract is not to be effective or binding until certain conditions are performed or occur, no binding contract will arise until the conditions specified have occurred or been performed.”

Blanton v. Liberty Nat. Life Ins. Co., 476 So. 2d 67 (Ala. 1985).

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So. 2d 143 (1975).

Life & Cas. Ins. Co. of Tenn. v. Latham, 255 Ala. 160, 50 So. 2d 727 (1951).

West’s Key Number Digest, Insurance ◊132(2), 1747, 1748, 1818.

Bibb Allen, *Alabama Liability Insurance Handbook* § 1.17 (2d ed. 2008).

Am. Jur. 2d Contracts § 34.

Am. Jur. 2d Insurance §§ 258, 260.

APJI 20.07 DELIVERY OF POLICY [PL]

An insurance company must deliver a copy of the insurance policy to the (purchaser of the policy/insured) within a reasonable time after the policy is issued. Unless there is a special contract that says differently, delivery of an insurance policy to the (purchaser/insured) is effective on the date the insurance company mails the policy to the (purchaser/insured) or sends the policy to its agent for the agent to deliver it to the (purchaser/insured).

Approved January 11, 2013

Notes on Use

Use this instruction when there is a question of fact about delivery of an insurance policy to the insured. Ala. Code § 27-14-19(a) (1975) (West's Alabama Code) states: "[s]ubject to the insurer's requirements as to payment of premium, every policy shall be mailed or delivered to the insured or to the person entitled thereto within a reasonable period of time after its issuance, except where a condition required by the insurer has not been met by the insured." For purposes of § 27-14-19, delivery to the agent of the insured is delivery to the insured. "The person entitled thereto" includes the purchaser of the policy. If the insurer fails to deliver the policy in accordance with § 27-14-19, the insurer may be estopped from asserting coverage conditions or exclusions that are in the policy but are not disclosed to the insured. *Brown Mach. Works & Supply Co., Inc. v. Insurance Co. of North America*, 659 So. 2d 51, 57 (Ala. 1995).

References

Ala. Code § 27-14-19 (1975) (West's Alabama Code).

Southern Foodservice Mgmt., Inc. v. American Fidelity Assur. Co., 850 So. 2d 316 (Ala. 2002).

Brown Mach. Works & Supply Co., Inc. v. Insurance Co. of North America, 659 So. 2d 51 (Ala. 1995).

Powell v. Republic Nat. Life Ins. Co., 337 So. 2d 1291 (Ala. 1976).

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So. 2d 143 (1975).

Liberty Nat. Life Ins. Co. v. Patterson, 278 Ala. 43, 175 So. 2d 737 (1965).

United Ins. Co. of America v. Headrick, 275 Ala. 594, 157 So. 2d 19 (1963).

Life & Cas. Ins. Co. of Tenn. v. Latham, 255 Ala. 160, 50 So. 2d 727 (1951).

West's Key Number Digest, Insurance ⇨1353 to 1759.

Bibb Allen, Allen's Alabama Liability Insurance Handbook § 4.08[1] (2d ed. 2008).

17 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 239:118 (3d ed. 2012).

Am. Jur. 2d Insurance §§ 238, 240 to 244.

APJI 20.08 AGENCY [PL]

NOTE: This instruction is withdrawn pending clarification of Alfa Life Ins. Corp. v. Reese, 185 So. 3d 1091 (Ala. 2015).

Approved January 11, 2013

Withdrawn September 11, 2015

**APJI 20.09 BINDING OR CONDITIONAL
RECEIPT [PL]**

An agent authorized to bind the insurance company may enter into an oral or written (binding/conditional) receipt on behalf of the insurance company.

A (binding/conditional) receipt is temporary insurance during the time the insurance company reviews the application and determines whether the applicant is an acceptable risk. A (binding/conditional) receipt is not an insurance policy, but is a temporary contract that controls the obligations of the insurance company before it issues the policy.

You must give a (binding/conditional) receipt the meaning the parties intended.

Approved November 9, 2012

Notes on Use

The terms “binding receipt” and “conditional receipt” are used interchangeably. *See* *Liberty Nat. Life Ins. Co. v. Patterson*, 278 Ala. 43, 46, 175 So. 2d 737, 740 (1965) (“The terms and conditions of the proposal for insurance in this case are specified in the application and in the ‘conditional advance deposit receipt.’ Normally the application for a life insurance policy and a ‘binder receipt’ must be taken together, and if they constitute all the elements of a contract, they are binding upon the insurer and insured.”).

A binding receipt or conditional receipt is a contract of insurance issued by the agent for an insurer recognizing a forthcoming insurance contract during negotiations for such a contract. When the application is made and the first premium is paid, the binding receipt acts as temporary insurance while the company investigates whether the applicant is insurable. *Custer v. Homeside Lending, Inc.*, 858 So. 2d 233 (Ala. 2003).

References

Land & Assocs., Inc. v. Simmons, 562 So. 2d 140, 146 (Ala. 1989) “To obtain some measure of protection against the applicant’s arbitrary withdrawal of his offer during the company’s extensive

investigation of his insurability, the insurance companies have hit upon the idea of issuing so-called binding receipts to the applicant upon the payment of the first premium.” (citing C. T. Drechsler, Annotation, Temporary Life, Accident, or Health Insurance Pending Approval of Application or Issuance of Policy, 2 A.L.R 2d 943 (1948)).

Alfa Life Ins. Corp. v. Reese, 185 So. 3d 1091 (Ala. 2015).

Alfa Life Ins. Corp. v. Colza, 159 So. 3d 1240 (Ala. 2014).

Reserve Life Ins. Co. v. Haster, 500 So. 2d 1052 (Ala. 1986).

Washington Nat. Ins. Co. v. Strickland, 491 So. 2d 872, 876 (Ala. 1985).

Blanton v. Liberty Nat. Life Ins. Co., 476 So. 2d 67, 70 (Ala. 1985).

Powell v. Republic Nat. Life Ins. Co., 337 So. 2d 1291, 1297 (Ala. 1976).

Liberty Nat'l Life Ins. Co. v. Patterson, 278 Ala. 43, 47, 175 So. 2d 737, 740 (1965). “ ‘Application for life policy and binder receipt must be taken together, and if together they constitute all elements of contract they are binding upon both the insurer and the insured.’ ” (quoting Guest v. Kennesaw Life & Accident Ins. Co., 97 Ga. App. 840, 104 S.W. 2d 633 (1958)).

Royal Neighbors of America v. Fortenberry, 214 Ala. 387, 389, 107 So. 846, 848 (1926). “In the absence of statutory provisions forbidding parol contracts to insure, memorandum contracts, or binding receipts or slips or books, it is established that an agent, duly authorized to bind the company by the issue and delivery of contracts for insurance, may make such binding contracts by parol, binding books, binding slips, binding receipts, or binding memoranda, etc.”

Cherokee Life Ins. Co. v. Brannum, 203 Ala. 145, 82 So. 175 (1919).

West's Key Number Digest, Insurance ☞1747, 1748, 1818.

Bibb Allen, *Allen's Alabama Liability Insurance Handbook* § 1.04 (2d ed. 2008).

Am. Jur. 2d Insurance § 250.

Hazel Beh & Jeffrey W. Stempel, *Misclassifying the Insurance*

APJI 20.09**ALABAMA PATTERN JURY INSTRUCTIONS**

Policy: The Unforced Errors of Unilateral Contract Characterization, 32 Cardozo L. Rev. 85 (2010).

Arnold P. Anderson, Life Insurance Conditional Receipts and Judicial Intervention, 63 Marq. L. Rev. 593 (1980).

**APJI 20.10 EFFECTIVE DATE OF BINDING OR
CONDITIONAL RECEIPT [PL]**

The terms of a (binding/conditional) receipt control the date temporary insurance coverage starts, if:

1. The conditions of the receipt were met; or
2. The conditions of the receipt were not met because the insurance company acted unreasonably.

You must decide when the insurance coverage was effective, if at all, either from the date of the (binding/conditional) receipt or the date the policy was issued. You should find that the effective date of the insurance coverage is the date of the (binding/conditional) receipt under any one of the following circumstances:

1. The conditions of the receipt were met; or
2. The conditions of the receipt were not met because the insurance company acted unreasonably.

Approved November 9, 2012

Notes on Use

Use the appropriate paragraphs when there is a question of fact about whether the insurance was effective on the date the receipt was issued or whether it was effective the date the policy was issued.

References

Land & Assocs., Inc. v. Simmons, 562 So. 2d 140, 146 (Ala. 1989) "These binding receipts, or conditional binding receipts, as these instruments are sometimes, though less frequently, called, usually contain a provision which, in some instances, is duplicated in the application itself, to the effect that the insurance shall be considered as in force from the date of the receipt, or the date of the medical examination, provided the application is approved and accepted at the home office of the insurer. Sometimes the date of

APJI 20.10**ALABAMA PATTERN JURY INSTRUCTIONS**

approval or of issuance of the policy is chosen as the date the policy shall become effective, and in some instances no condition is imposed upon the applicant. The exact language of these provisions varies greatly.” (citing C. T. Drechsler, Annotation, Temporary Life, Accident, or Health Insurance Pending Approval of Application or Issuance of Policy, 2 A.L.R 2d 943 (1948)).

Barnes v. Atlantic & Pac. Life Ins. Co. of America, 295 Ala. 149, 325 So. 2d 143 (1975). (unreasonable delay in issuing policy may estop insurer from denying coverage).

West’s Key Number Digest, Insurance ☞1747, 1748, 1818.

APJI 20.11 to 20.15**Reserved**

**APJI 20.16 ORAL INSURANCE CONTRACTS
[PL]**

An oral (insurance contract/contract to insure) is a valid contract and does not need to be in writing. An agent authorized to bind the insurance company may enter into an oral (insurance contract/contract to insure). An oral (insurance contract/contract to insure) is valid if all of the essential elements of an insurance contract are agreed upon.

Approved January 11, 2013

Notes on Use

Use this instruction when the plaintiff claims a duly authorized agent of an insurance company agreed orally to obtain a policy of insurance or agreed orally on the terms of a contract of insurance. Follow this instruction with by APJI 20.01—Elements of an Insurance Contract.

References

Mobile Airport Auth. v. HealthSTRATEGIES, Inc., 886 So. 2d 773, 781 (Ala. 2004). “An oral contract for insurance may exist, so long as the ‘essential terms’ of the contract are agreed upon. The ‘essential terms’ of an insurance contract are (1) the rate of premium, (2) the duration of the policy, (3) the nature of the risk, (4) a description of the property or person or interest to be insured and its location, and (5) the amount of insurance.” (internal citation omitted).

Gulf Gate Mgmt. Corp. v. St. Paul Surplus Lines Ins. Co., 646 So. 2d 654 (Ala. 1994).

Powell v. State Farm Mut. Auto. Ins. Co., 601 So. 2d 60, 62 (Ala. 1992).

Hartford Acc. & Indem. Co. v. Oglesby, 293 Ala. 620, 308 So. 2d 695 (1975).

Hartford Fire Ins. Co. v. Shapiro, 270 Ala. 149, 117 So. 2d 348 (1960).

Springfield Fire & Marine Ins. Co. v. De Jarnett, 111 Ala. 248, 19 So. 995 (1896).

Mobile Marine Dock & Mut. Ins. Co. v. McMillan, 31 Ala. 711, 1858 WL 456 (1858).

West's Key Number Digest, Insurance ⇨1743.

Bibb Allen, Allen's Liability Insurance Handbook §§ 1.03, 3.02 (2d ed. 2008).

1A Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 17:9 (3d ed. 2012).

16 Richard A. Lord, Williston on Contracts § 49:55 (4th ed. 2012).

Am. Jur. 2d Insurance § 218.

**APJI 20.17 BREACH OF INSURANCE
CONTRACT [PL]**

Plaintiff (name of plaintiff) says that defendant (name of defendant) breached or broke its promise to pay (him/her/it) for a loss covered under an insurance contract.

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. There was a contract of insurance between (name of plaintiff) and (name of defendant);
2. That (name of plaintiff) suffered a loss, (all of/part of) which was covered under the insurance policy with (name of defendant); and
3. That (name of defendant) did not pay benefits due under the insurance contract.

Approved January 11, 2013

Notes on Use

This is a new instruction. Use it for first-party coverage claims.

References

Ex parte American Heritage Life Ins. Co., 46 So. 3d 474 (Ala. 2010).

Congress Life Ins. Co. v. Barstow, 799 So. 2d 931 (Ala. 2001).

State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293 (Ala. 1999).

West's Key Number Digest, Contracts ☞326; Insurance ☞3540, 3541.

Am. Jur. 2d Contracts §§ 699 to 712.

Am. Jur. 2d Insurance §§ 1902, 1903.

**APJI 20.18 BREACH OF TEMPORARY
INSURANCE CONTRACT [PL]**

Plaintiff (name of plaintiff) says that defendant (name of defendant) breached or broke its promise to pay (him/her/it) for a loss covered under a temporary insurance contract called a (binding/conditional) receipt.

To recover damages on this claim (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. That (name of defendant) or its authorized agent provided (name of plaintiff) with a (binding/conditional) receipt;
2. That (name of plaintiff) paid the premium owed;
3. That (name of plaintiff/name of applicant) met the conditions of the receipt;
4. That (name of plaintiff/name of applicant) suffered a covered loss during the time the (binding/conditional) receipt was in effect; and
5. That (name of defendant) did not pay benefits due under the (binding/conditional) receipt.

Approved January 11, 3013

Amended September 11, 2015

Notes on Use

This is a new instruction. This instruction should follow APJI 20.09, Binding or Conditional Receipts, and APJI 20.10, Effective Date of Binding or Conditional Receipts.

References

Alfa Life Ins. Corp. v. Colza, 159 So. 3d 1240 (Ala. 2014).

INSURANCE

APJI 20.18

Hartford Acc. & Indem. Co. v. Oglesby, 293 Ala. 620, 308 So. 2d 695 (1975).

National Life & Acc. Ins. Co. v. Claytor, 254 Ala. 413, 48 So. 2d 180 (1950).

**APJI 20.19 ANSWERS IN AN APPLICATION-
BASIS FOR POLICY [PL]**

An insurance company is entitled to truthful answers to its questions in an application for insurance. The company is entitled to all information called for in the application about the obligation it undertakes in issuing an insurance policy.

Approved March 8, 2013

Notes on Use

Use this instruction when the defendant pleads an affirmative defense under Ala. Code § 27-14-7 (1975) (West's Alabama Code). *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769, 779 (Ala. 2004). APJI 20.20 follows this instruction.

References

Ala. Code § 27-14-7 (a) (1975) (West's Alabama Code) states:

(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either: (1) Fraudulent; (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Alfa Life Ins. Corp. v. Reese, 185 So. 3d 1091 (Ala. 2015).

Patterson v. Liberty Nat'l Life Ins. Co., 903 So. 2d 769, 779 (Ala. 2004). “We conclude that a defense of misrepresentation under § 27-14-7, Ala. Code 1975, is an affirmative defense that is waived if not properly pleaded.”

Reserve Life Ins. Co. v. Haster, 500 So. 2d 1052, 1054 (Ala. 1986).

Bankers Life & Cas. Co. v. Long, 345 So. 2d 1321, 1323 (Ala. 1977), (citing New York Life Ins. Co. v. Strudel, 243 F.2d 90 (5th Cir. 1957)). “The policy is not avoided if the insurer knows the true facts, or the falsity of the statements, or has sufficient indications that would put a prudent person on notice so as to induce an inquiry which, if done with reasonable thoroughness, would reveal the truth.”

Liberty Nat'l Life Ins. Co. v. Hale, 285 Ala. 198, 230 So. 2d 526 (1969).

State Farm Mut. Auto. Ins. Co. v. Newell, 270 Ala. 550, 120 So. 2d 390 (1960).

Meador v. Cincinnati Ins. Co., 915 So. 2d 60, 64 (Ala. Civ. App. 2005) (insurer's fraud defense was an affirmative defense under the holding in Patterson; the burden of proving an affirmative defense is on the insurer).

West's Key Number Digest, Insurance ☞1987, 3571.

Am. Jur. 2d Insurance § 1019.

16 Richard A. Lord, Williston on Contracts § 49:51 (4th ed. 2012).

F. Lane Finch, Jr., Misrepresentation in the Insurance Application, 65 Ala. Law. 309 (September 2004).

**APJI 20.20 MISREPRESENTATIONS,
OMISSIONS, INCORRECT
ANSWERS IN APPLICATION—
AFFIRMATIVE DEFENSE [PL]**

(Name of insurer) says it does not have to pay the (claim/benefits) because (name of applicant) gave incorrect answers to questions asked in the application for the insurance policy. (Name of insurer) says the application asked (state the questions), and (name of applicant) incorrectly answered the questions.

(Name of insurer) can avoid paying the (claim/benefits) if it proves to your reasonable satisfaction:

1. (Name of applicant) applied for (life/health/etc.) insurance with (name of insurer);
2. The application asked (state the questions asked or information the applicant was required to give), and (name of applicant) gave incorrect (answer(s)/information); and either

§ 27-14-7 (a) (1)

- a. (Name of applicant) knew (the answer(s)/information) was incorrect but (name of insurer) did not know (the answer(s)/information) was incorrect;
- b. (Name of applicant) intended that (name of insurer) rely on the (answer(s)/information) and (name of insurer) reasonably relied on it and (issued the policy/issued the policy at the rate it did/did not exclude coverage, etc.); and,
- c. If (name of insurer) had known the truth it would (not have issued the policy/ issued the policy at the rate it did/ have excluded coverage for —, etc.).

-OR-

§ 27-14-7 (a) (2)

a. (Name of applicant) innocently gave incorrect (answer(s)/information) but the (answer(s)/information) was material to (name of insurer)'s decision to issue the policy; and,

b. If (name of insurer) had known the truth it would not have issued the policy it issued.

Material: A representation is material if (name of insurer) acted as a rational and prudent company and relied on the representation when it issued the policy.

-OR-

§ 27-14-7 (a) (3)

a. (Name of applicant) innocently gave incorrect (answer(s)/information), but if (name of insurer) had known the truth it would have decided in good faith:

i. That it would not issue the policy, or

ii. That it would not issue the policy at the premium rate that (name of applicant) applied for, or

iii. That it would not issue the policy in as large an amount, or

iv. That it would not provide coverage for the hazard that resulted in the loss.

Good faith: (Name of insurer) acts in good faith if it will not issue an insurance policy to a (person/company) when (state the underwriting practice, e.g. a person is employed less than thirty hours a week).

If (name of insurer) proves this defense you must find for (name of insurer).

Approved March 8, 2013

Notes on Use

This instruction is based on Ala. Code § 27-14-7 (1975) (West’s Alabama Code). It combines and replaces instructions APJI 20.18 to 20.24 (3d ed. 2012).

Use this instruction when the insurer seeks to avoid paying a claim or benefits because, it claims the applicant made misrepresentations, omitted information from or gave incorrect information in the application. The instruction can be amended to state the elements the insurer must prove in a declaratory judgment action.

The user should read the referenced cases to determine if the circumstances exist that are exceptions to the statute.

References

Ala. Code § 27-14-7(a) (1975) (West’s Alabama Code) states:

(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either: (1) Fraudulent; (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Alfa Life Ins. Corp. v. Reese, 185 So. 3d 1091 (Ala. 2015).

Ex parte Quality Cas. Ins. Co., 962 So. 2d 242 (Ala. 2006).

Alfa Life Ins. Corp. v. Lewis, 910 So. 2d 757 (Ala. 2005). “The materiality of a misrepresentation on a policy application is generally a jury question under Alabama law. However, it has been held

that some misrepresentations, whether made intentionally or innocently, increase the risk of loss as a matter of law and are therefore material to the issuance of the policy. Where the insurer specifically inquires as to a fact, the insured is thereby on notice that the insurer considers it material.”

Patterson v. Liberty Nat’l Life Ins. Co., 903 So. 2d 769, 779 (Ala. 2004). Ala. Code § 27-14-7 (1975) (West’s Alabama Code), “when applicable, makes an insurance policy voidable at the option of the insurer. It constitutes an affirmative defense to a claim based on the breach of an existing contract. A defense of misrepresentation under § 27-14-7 is an argument that, if true, will defeat the plaintiff’s claim, even if the allegations in the complaint are true. In other words, if successful, the defense will allow Liberty National to avoid an otherwise valid insurance contract.”

Nationwide Mut. Fire Ins. Co. v. Pabon, 903 So. 2d 759 (Ala. 2004). “Absent misrepresentations, fraud, or other deceit by the agent, a person able to read and write is bound by an insurance application signed by him or her, whether or not he or she reads it.”

Loyal American Life Ins. Co., Inc. v. Mattiace, 679 So. 2d 229, 234 (Ala. 1996).

Miller v. Dobbs Mobile Bay, Inc., 661 So. 2d 203, 206 (Ala. 1995). “An insurance company cannot defend its refusal to pay benefits on grounds that the insured made a misrepresentation in the application if the misrepresentation was the fault of the agent and that fault was without participation of the insured.”

Duren v. Northwestern Nat’l Life Ins. Co., 581 So. 2d 810 (Ala. 1991).

National Life & Acc. Ins. Co. v. Mixon, 291 Ala. 467, 282 So. 2d 308 (1973).

National Life & Acc. Ins. Co. v. Allen, 285 Ala. 551, 554, 234 So. 2d 567, 570 (1970). “When without any fault on the part of the insured through neglect of the insurer’s agent, misstatements are made in the application, the insurer cannot defend on this ground.”

Liberty Nat’l Life Ins. Co. v. Hale, 285 Ala. 198, 230 So. 2d 526 (1969).

Liberty Nat’l Life Ins. Co. v. Trammell, 255 Ala. 1, 51 So. 2d 174 (1949).

New York Life Ins. Co. v. Zivitz, 243 Ala. 379, 10 So. 2d 276 (1942).

Sovereign Camp, W.O.W. v. Young, 237 Ala. 288, 186 So. 453 (1939).

New York Life Ins. Co. v. Horton, 235 Ala. 626, 180 So. 277 (1938).

National Life & Acc. Ins. Co. v. Baker, 226 Ala. 501, 147 So. 427 (1933). “Where an insurance agent does not ask questions of the insured but writes answers as though he had done so, the insurer cannot deny coverage on this basis.”

Life Ins. Co. of Virginia v. Newell, 223 Ala. 401, 137 So. 16 (1931).

Miller v. Metropolitan Life Ins. Co., 214 Ala. 4, 106 So. 335 (1925).

Bankers Life & Cas. Co. v. Long, 48 Ala. App. 570, 266 So. 2d 780 (Civ. App. 1972).

Mega Life And Health Ins. Co. v. Pieniozek, 516 F.3d 985 (11th Cir. 2008) (applying Alabama law).

State Farm Fire and Cas. Co. v. Oliver, 854 F.2d 416 (11th Cir. 1988) (applying Alabama law).

Allstate Ins. Co. v. Swann, 27 F.3d 1539, 40 Fed. R. Evid. Serv. 1483 (11th Cir. 1994) (applying Alabama law).

West’s Key Number Digest, Insurance ☞2950 to 3026.

42 Am. Jur. 2d Insurance §§ 722, 738, 759, 760.

**APJI 20.21 MISREPRESENTATION BY
INSURED AFTER LOSS—
AFFIRMATIVE DEFENSE [PL]**

(Name of insurer) says it does not have to pay the (claim/benefits) because plaintiff (name of plaintiff) made false statements after the loss.

(Name of insurer) does not have to pay the (claim/benefits) if it proves to your reasonable satisfaction:

1. That (name of plaintiff) made a material false statement; and
2. That (name of plaintiff) knew that the statement was false and made it with the intent to deceive the insurer.

If (name of insurer) proves this defense you must find for (name of insurer).

Approved May 10, 2013

Notes on Use

Use this instruction when the defendant pleads an affirmative defense under Ala. Code § 27-14-28 (1975) (West's Alabama Code).

References

Ala. Code § 27-14-28 (1975) (West's Alabama Code) states:

No misrepresentation in any proof of loss under any insurance policy shall defeat or void the policy unless such misrepresentation is made with actual intent to deceive as to a matter material to the insured's rights under the policy.

United Servs. Auto. Ass'n v. Wade, 544 So. 2d 906 (Ala. 1989).

Ex parte State Farm Fire and Cas. Co., 523 So. 2d 119 (Ala. 1988).

Payne v. Nationwide Mut. Ins. Co., 456 So. 2d 34 (Ala. 1984).

**APJI 20.22 MISREPRESENTATION BY
INSURED AFTER LOSS—VALUE OF
PROPERTY—AFFIRMATIVE
DEFENSE [PL]**

A slight overstatement about the value of (describe the property) is not a false statement. To find that (name of insured)'s statement was false, the value must be so overstated that it leads you to conclude that (name of insured) knew it was false and not a mistake in judgment.

Approved May 10, 2013

Notes on Use

Use this instruction in conjunction with APJI 20.21 when the defendant pleads an affirmative defense under Ala. Code § 27-14-28 (1975) (West's Alabama Code).

References

West v. Green, 284 Ala. 517, 226 So. 2d 302 (1969).

Hartford Fire Ins. Co. v. Clark, 258 Ala. 141, 61 So. 2d 19 (1952).

Auto Club Family Ins. Co. v. Mullins, 2012 WL 6043652 *4 (N.D. Ala. 2012).

West's Key Number Digest, Insurance ☞3182.

13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 197.30 (3d ed. 2012).

Am. Jur. 2d Insurance § 1365.

APJI 20.23 SUICIDE—DEFINITION [PL]

A person commits suicide if (he/she) voluntarily and intentionally takes (his/her) life.

Approved November 9, 2012

Notes on Use

Use this instruction when the defendant pleads suicide as a defense to the suit on a life insurance policy and when the defendant pleads the defense to suits on accidental death or double indemnity.

References

Gilmore v. Shell Oil Co., 613 So. 2d 1272 (Ala. 1993).

Fleetwood v. Pacific Mut. Life Ins. Co., 246 Ala. 571, 21 So. 2d 696 (1945).

Woodmen of the World v. Wright, 7 Ala. App. 255, 60 So. 1006 (1913).

West's Key Number Digest, Insurance ⌘1, 2434.

APJI 20.24 SUICIDE—PRESUMPTIONS [PL]

There is a presumption in the law against suicide. The law presumes that every sane person wants to live. When a person dies it is presumed that (he/she) did not intentionally and voluntarily take (his/her) life.

If (name of deceased) was insane at the time of (his/her) death, there is no presumption against suicide.

Approved November 9, 2012

Notes on Use

Use this instruction when the cause of an insured's death is disputed and the death certificate does not state that the cause of death was suicide. If it does, see APJI 20.27. The plaintiff is not required to prove the truth of any particular theory of the exact manner of the insured's death to be entitled to have the case submitted to the jury. The presumption against suicide is sufficient to take the case to the jury and the jury should be instructed about the presumption.

Use the second paragraph when there is evidence the insured was insane.

References

Federated Guar. Life Ins. Co. v. Wilkins, 435 So. 2d 10, 13 (Ala. 1983) (insurer must prove insured committed suicide).

Jefferson Standard Life Ins. Co. v. Pate, 290 Ala. 110, 274 So. 2d 291 (1973).

Jefferson Standard Life Ins. Co. v. Wigley, 248 Ala. 676, 29 So. 2d 218 (1947).

Fleetwood v. Pacific Mut. Life Ins. Co., 246 Ala. 571, 21 So. 2d 696 (1945). "If there is direct and positive evidence of suicide and there is no conflicting inference from any evidence as to suicide, then the presumption against suicide has no field of operation. On the contrary, if there is direct and positive evidence of suicide and there is a conflicting inference from any evidence as to suicide, then the presumption against suicide has a field of operation. If

the evidence is all circumstantial, then the presumption against suicide has a field of operation. We may add that inference means reasonable inference and not mere speculation or conjecture.”

New York Life Ins. Co. v. Beason, 229 Ala. 140, 155 So. 530 (1934).

West's Key Number Digest, Evidence Ⓒ59, 63, 157, 2445.

II Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 456.06(6th ed. 2009).

Ala. R. Evid. 301.

9A, Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 138:58 (3d ed. 2012).

Am. Jur. 2d Evidence § 287.

Am Jur. 2d Insurance §§ 535 to 549, 1967, 2031.

**APJI 20.25 SUICIDE—AFFIRMATIVE
DEFENSE [PL]**

(Name of plaintiff) says (name of defendant) owes a death benefit of \$____.00 under the life insurance policy. (Name of defendant) says it does not owe the money because (name of deceased) committed suicide. To establish this defense, (name of defendant) must prove to your reasonable satisfaction that (name of deceased) voluntarily and intentionally took (his/her) life.

If you are reasonably satisfied from the evidence that (name of deceased) committed suicide, (name of plaintiff) cannot recover and you must find for (name of defendant).

If you are not reasonably satisfied from the evidence that (name of deceased) committed suicide, you must find for (name of plaintiff) and you must award (him/her/it) the death benefit of \$____.

Approved November 9, 2012

Notes on Use

Use this instruction in any case when the insurer has pleaded suicide as a defense. Suicide may also be an exclusion under the policy.

References

Federated Guar. Life Ins. Co. v. Wilkins, 435 So. 2d 10 (Ala. 1983) (insurer raised suicide as an affirmative defense).

Cotton States Life Ins. Co. v. Knowles, 45 Ala. App. 607, 234 So. 2d 886 (1970).

Pacific Mut. Life Ins. Co. v. Yeldell, 36 Ala. App. 652, 62 So. 2d 805 (1953).

West's Key Number Digest, Insurance ¶2445.

9A Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 138:58 (3d ed. 2012).

Jerome A. Hoffman & William A. Schroeder, Burdens of Proof,
38 Ala. L. Rev. 31, 55 (1986).

Am. Jur. 2d Insurance §§ 1967, 2031.

APJI 20.26 SUICIDE—MOTIVE [PL]

Motive or lack of motive is not conclusive whether (name of deceased) did or did not commit suicide. You should consider all of the evidence in determining whether (name of deceased) committed suicide.

Approved November 9, 2012

Notes on Use

Use this instruction in life insurance policy cases when the insurer has pleaded suicide as an affirmative defense.

References

Jefferson Standard Life Ins. Co. v. Pate, 290 Ala. 110, 114, 274 So. 2d 291 (1973).

Pacific Mut. Life Ins. Co. v. Yeldell, 36 Ala. App. 652, 62 So. 2d 805 (1953).

**APJI 20.27 DEATH CERTIFICATE—PRIMA
FACIE EVIDENCE [PL]**

A certified copy of (name of deceased)'s death certificate is evidence that establishes (name of deceased) died from (state cause). This evidence can be disputed by other evidence, including medical or lay witness testimony.

Approved November 9, 2012

Notes on Use

Use this instruction when the death certificate of the deceased-insured is admitted in evidence and states the cause of death. A death certificate that states suicide prevails over the presumption against suicide unless the plaintiff reasonably satisfies the jury that the deceased's death was due to some other cause.

References

Ala. R. Civ. P. 44.

Ala. Code § 12-21-101 (1975) (West's Alabama Code).

Ala. Code § 22-9A-22 (1975) (West's Alabama Code).

Ala. R. Evid. 301(c), Advisory Committee Comments.

Ex parte Orton, 402 So. 2d 980 (Ala. 1981).

Jefferson Standard Life Ins. Co. v. Pate, 290 Ala. 110, 274 So. 2d 291 (1973).

Union Cent. Life Ins. Co. v. Scott, 286 Ala. 10, 236 So. 2d 328 (1970).

Independent Life & Acc. Ins. Co. of Jacksonville v. McGehee, 284 Ala. 394, 225 So. 2d 805 (1969).

Sorrow v. Industrial Life & Health Ins. Co., 259 Ala. 544, 68 So. 2d 43 (1953).

Jefferson Standard Life Ins. Co. v. Wigley, 248 Ala. 676, 29 So. 2d 218 (1947).

APJI 20.27**ALABAMA PATTERN JURY INSTRUCTIONS**

Fleetwood v. Pacific Mut. Life Ins. Co., 246 Ala. 571, 21 So. 2d 696 (1945).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 44.2 (5th ed. 2010).

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 8:53 (3d ed. 2013).

II Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 456.06(1) (6th ed. 2009).

Am. Jur. 2d Insurance § 2032.

**APJI 20.28 NEGLIGENT FAILURE TO OBTAIN
INSURANCE [PL]**

Plaintiff (name of plaintiff) says (he/she/it) was harmed by Defendant (name of defendant)'s negligent failure to obtain the insurance requested by (name of plaintiff).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of plaintiff) requested (name of defendant) to obtain insurance coverage (state type of coverage) and (he/she/it) agreed to do so;
2. That (name of defendant) negligently failed to obtain the insurance. (Name of defendant) was negligent if (he/she/it) failed to use the care, skill, and diligence that a reasonable and prudent (agent/broker) would have used in similar circumstances;
3. That (name of plaintiff) was harmed; and
4. That (name of defendant)'s negligence was a cause of (name of plaintiff)'s harm.

If (name of plaintiff) proved all these things, you must find for (him/her/it), and then you must determine the amount of money that will reasonably compensate (name of plaintiff) for the harm. If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved January 11, 2013

Revised October 10, 2014

Notes on Use

Use this instruction when the plaintiff's claim is a simple claim that the agent or broker negligently failed to obtain insurance. A plaintiff may also claim wanton failure to obtain insurance.

The instruction must be modified when the plaintiff also claims the agent or broker negligently failed to tell the plaintiff that the agent failed to obtain insurance, or failed to inform the plaintiff that insurance was cancelled, etc. The claim can arise under various fact situations, and the claim can arise in the construction industry context. See, e.g., *FabArc Steel Supply, Inc. v. Composite Const. Systems, Inc.*, 914 So. 2d 344 (Ala. 2005).

The applicant's contributory negligence is a defense to a claim against the agent or broker. In a case of first impression, the Supreme Court of Alabama held the named beneficiary was negligent as a matter of law because neither she nor the applicant read the completed application or the conditional receipt, both of which stated terms clearly inconsistent with the agent's statement that the applicant's life would be covered as soon as the first premium is paid. *Alfa Life Ins. Corp. v. Colza*, 159 So. 3d 1240 (Ala. 2014). The user should read the case in its entirety.

This instruction does not state whether the measure of damages is contract or tort damages. The user must consult all relevant case authority including *Timmerman Ins. Agency, Inc. v. Miller*, 285 Ala. 82, 229 So. 2d 475 (1969); *Waldon v. Commercial Bank*, 50 Ala. App. 567, 281 So. 2d 279 (Civ. App. 1973); *Crump v. Geer Bros., Inc.*, 336 So. 2d 1091 (Ala. 1976); *Highlands Underwriters Ins. Co. v. Elegante Inns, Inc.*, 361 So. 2d 1060 (Ala. 1978).

References

Alfa Life Ins. Corp. v. Colza, 159 So. 3d 1240 (Ala. 2014).

Maloof v. John Hancock Life Ins. Co., 60 So. 3d 263 (Ala. 2010).

FabArc Steel Supply, Inc. v. Composite Const. Systems, Inc., 914 So. 2d 344 (Ala. 2005).

Lewis v. Roberts, 630 So. 2d 355 (Ala. 1993).

Goodyear Tire and Rubber Co. v. J.M. Tull Metals Co., 629 So. 2d 633, 639 (Ala. 1993). "Agreements to procure insurance are generally enforceable under Alabama law, and a party who breaches such an agreement is liable for damages resulting from the failure to obtain the promised insurance."

Henson v. Celtic Life Ins. Co., 621 So. 2d 1268 (Ala. 1993).

Cornett v. Johnson, 578 So. 2d 1259 (Ala. 1991).

Crump v. Geer Bros., Inc., 336 So. 2d 1091 (Ala. 1976).

Timmerman Ins. Agency, Inc. v. Miller, 285 Ala. 82, 229 So. 2d 475 (1969).

Kanellis v. Pacific Indem. Co., 917 So. 2d 149, 155 (Ala. Civ. App. 2005).

First Alabama Bank of Montgomery, N.A. v. First State Ins. Co., Inc., 899 F.2d 1045 (11th Cir. 1990).

West's Key Number Digest, Insurance ☞271, 1654, 1671.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 1.02 (5th ed. 2010).

4 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 55.10 (3d ed. 2012).

Am. Jur. 2d, Insurance §§ 163, 165, 166.

APJI 20.29 ACCIDENT POLICY—BURDEN OF PROOF [PL]

(Name of plaintiff) says (his/her injury was caused by an accident) (name of deceased's death was caused by an accident). (Name of defendant) says (name of plaintiff's injury) (name of deceased's death) was not caused by an accident: it was caused by (describe what defendant says caused the injury/death).

To recover, (name of plaintiff) must prove that (his/her injury) (name of deceased's death) was caused by an accident.

Approved March 8, 2013

Notes on Use

Use this instruction when the plaintiff claims accident, accidental death or double indemnity insurance benefits. If the defendant pleads suicide as a defense, the trial judge should give APJI 20.22 to 20.27.

References

Hairston v. Liberty Nat'l Life Ins. Co., 584 So. 2d 807 (Ala. 1991). Death is accidental if the death or injury causing death is the result of something unforeseen, unexpected and unusual and not intentional.

Hearn v. Southern Life & Health Ins. Co., 454 So. 2d 932, 933 (Ala. 1984). "To constitute an accidental death, it must have resulted from something unforeseen, unexpected, and unusual . . . or 'which happens as by chance, or which does not take place according to the usual course of things', or 'without foresight or expectations' or 'by reason of some violence, casualty, or vis major to the assured, without his design or consent or voluntary cooperation.' " (quoting *O'Bar v. Southern Life & Health Ins. Co.*, 232 Ala. 459, 462, 168 So. 580, 582 (1936)).

National Life & Acc. Ins. Co. v. Allen, 285 Ala. 551, 234 So. 2d 567 (1970).

Lambert v. National Cas. Co., 249 Ala. 85, 29 So. 2d 572 (1947).

O'Bar v. Southern Life & Health Ins. Co., 232 Ala. 459, 168 So. 580 (1936).

New York Life Ins. Co. v. Jenkins, 229 Ala. 474, 158 So. 309 (1934).

Inter-Ocean Cas. Co. v. Jordan, 227 Ala. 383, 150 So. 147 (1933).

Protective Life Ins. Co. v. Swink, 222 Ala. 496, 132 So. 728 (1931).

Insurance Co. of North America v. Southern, 52 Ala. App. 357, 292 So. 2d 476 (1974). A beneficiary suing to recover accidental death benefits had the burden to prove to the reasonable satisfaction of the jury that the beneficiary was killed by accidental means.

West's Key Number Digest, Insurance ☞2275, 2592, 2594 (2) & (3), 2608.

Bibb Allen, Allen's Alabama Liability Insurance Handbook §§ 8.04, 8.05, 8.07 (2d ed. 2008).

Am. Jur. 2d Insurance §§ 568, 569, 570.

**APJI 20.30 ACCIDENT POLICY—DEFINITIONS
[PL]**

(Accident: Accident means an event that happens without intention or design and which is unexpected, unusual or unforeseen. An injury or death caused by an intentional act is not normally the result of an accident. However, even if the injury or death was caused by an intentional act, it still is an accident if it was unforeseen, unusual or unexpected.)

(Accidental means: Accidental means refers to a means that could not reasonably have been expected or intended to cause the event. An (injury/death) by accidental means does not occur if the insured voluntarily did some act which (he/she) knows is likely to produce (injury/death) and the (injury/death) resulted from the act.)

(Accidental result or accidental death: Accidental result or accidental death mean a result or death caused by something (name of plaintiff/deceased) did not foresee, expect, and the result was unusual. (He/she) did not intend the result.)

When you apply this definition you must examine (name of plaintiff/deceased)'s conduct from (his/her) point of view. You must determine if (he/she) had a reasonable basis to believe that the conduct would result in (injury/death).

Approved March 8, 2013

Notes on Use

Use the definition when appropriate, but do not use if it conflicts with the definition in the insurance policy.

Use the accidental death definition when the policy of insurance insures against death by accident and does not require that the death be the result of accidental means, or external, violent or accidental means.

Use the death by accidental means definition when the action

involves an accidental death policy of insurance, or when the action involves a life insurance policy, double indemnity benefits are claimed, and the policy provides that death be the result of accidental means.

Use the injury from accidental means definition when the action involves an accidental injury policy of insurance and the policy provides that the injury be the result of accidental means.

References

Hartford Cas. Ins. Co. v. Merchants & Farmers Bank, 928 So. 2d 1006 (Ala. 2005).

Hairston v. Liberty Nat. Life Ins. Co., 584 So. 2d 807 (Ala. 1991).

National Life & Acc. Ins. Co. v. Allen, 285 Ala. 551, 234 So. 2d 567 (1970).

Aetna Life Ins. Co. v. Beasley, 272 Ala. 153, 130 So. 2d 178 (1961).

Emergency Aid Ins. Co. v. Dobbs, 263 Ala. 594, 83 So. 2d 335 (1955).

Adkins v. Metropolitan Life Ins. Co., 235 Ala. 417, 179 So. 382 (1938).

O'Bar v. Southern Life & Health Ins. Co., 232 Ala. 459, 168 So. 580 (1936).

Northam v. Metropolitan Life Ins. Co., 231 Ala. 105, 163 So. 635 (1935).

Inter-Ocean Casualty Co. v. Foster, 226 Ala. 348, 147 So. 127 (1933).

Prudential Cas. Co. v. Curry, 10 Ala. App. 642, 65 So. 852 (1914).

West's Key Number Digest, Insurance ☞2275.

Bibb Allen, *Allen's Alabama Liability Insurance Handbook* § 8.03 (2d ed. 2008).

Am. Jur. 2d, Insurance §§ 1219 to 1222, 1229.

**APJI 20.31 ACCIDENT POLICY—VIOLATION
OF LAW [PL]**

If you are reasonably satisfied that (name of plaintiff/deceased)'s (injury/death) resulted because (he/she) (took part in a crime/committed a felony/violated the law), (name of plaintiff) cannot recover under the insurance policy. In these circumstances the (injury/death) did not result by accidental means.

Approved March 8, 2013

Notes on Use

Use this instruction when the policy excludes or limits coverage for injury or death caused by the insured's commission or participation in a felony or the injury or death is a result of violation of the law. Modify the instruction to conform to the wording of the policy.

References

Hearn v. Southern Life & Health Ins. Co., 454 So. 2d 932 (Ala. 1984).

Hobbs v. Sovereign Camp W.O.W., 212 Ala. 467, 102 So. 625 (1924).

United Order of the Golden Cross v. Overton, 203 Ala. 335, 83 So. 59 (1919).

National Sec. Ins. Co. v. Olds, 43 Ala. App. 490, 192 So. 2d 749 (1966).

American Life Ins. Co. v. Morris, 37 Ala. App. 438, 72 So. 2d 414 (1953), cert. denied, 260 Ala. 693, 72 So. 2d 418 (1954).

West's Key Number Digest, Insurance ⌘2594.

Bibb Allen, Allen's Alabama Liability Insurance Handbook §§ 8:5, 8:6 (2d ed. 2008).

**APJI 20.32 ACCIDENT POLICY—INSURED'S
VOLUNTARY ACT [PL]**

If (name of plaintiff/deceased) knew (his/her) voluntary act would likely (injure/kill) (him/her) and it did cause (his/her) (injury/death), then (his/her) (injury/death) was not the result of accidental means.

Approved March 8, 2013

Notes on Use

Use this instruction when the action involves an accidental death insurance policy.

Use this instruction when the action involves a life insurance policy and double indemnity benefits are claimed. There must be evidence that the insured did a voluntary act which he or she knew was likely to produce injury or death, and the conduct resulted in his or her injury or death.

References

Hairston v. Liberty Nat. Life Ins. Co., 584 So. 2d 807 (Ala. 1991).

Emergency Aid Ins. Co. v. Dobbs, 263 Ala. 594, 83 So. 2d 335 (1955).

Northam v. Metropolitan Life Ins. Co., 231 Ala. 105, 163 So. 635 (1935).

Inter-Ocean Casualty Co. v. Foster, 226 Ala. 348, 147 So. 127 (1933).

Winsor v. Massachusetts Mut. Life Ins. Co., 30 Ala. App. 64, 200 So. 641 (1941).

Tyler v. AIG Life Ins. Co., 273 Fed. Appx. 778 (11th Cir. 2008).

West's Key Number Digest, Insurance ¶2592.

Bibb Allen, *Allen's Alabama Liability Insurance Handbook* §§ 8.5, 8.6 (2d ed. 2008).

10 Lee R. Russ & Thomas F. Segalla, Couch on Insurance
§ 139:21, 139:24 (3d ed. 2012).

Am. Jur. 2d, Insurance §§ 1222, 1229, 1236, 1274, 1282.

**APJI 20.33 ACCIDENTAL DEATH POLICY—
INSURED AS AGGRESSOR [PL]**

(Name of defendant) says (name of plaintiff) should not recover because (name of deceased)'s death was not (accidental) (the result of accidental means).

If (name of deceased) was the aggressor and attacked (name), and the nature of the attack would naturally have caused (name) to resist the attack with deadly force and (he/she) killed (name of deceased), (his/her) death was not (accidental) (the result of accidental means).

Approved March 8, 2013

Notes on Use

Use this instruction when the plaintiff claims on an accidental death policy of insurance or when the claim is on a life insurance policy for double indemnity benefits. There must be evidence that the insured's voluntary conduct brought on or resulted in the injury which caused his death.

References

Jackson v. State Farm Fire and Cas. Co., 661 So. 2d 232 (Ala. 1995) (action to declare whether insurer had duty to defend, test is subjective from insured's point of view).

Howard v. Southern Life and Health Ins. Co., 474 So. 2d 1109, 1112 (Ala. 1985).

Provident Life & Acc. Ins. Co. v. Hanna, 294 Ala. 37, 311 So. 2d 294 (1975).

Aetna Life Ins. Co. v. Beasley, 272 Ala. 153, 130 So. 2d 178 (1961).

O'Bar v. Southern Life & Health Ins. Co., 232 Ala. 459, 168 So. 580 (1936).

Atlantic American Life Ins. Co. v. White, 332 So. 2d 389 (Ala. Civ. App. 1976).

APJI 20.33**ALABAMA PATTERN JURY INSTRUCTIONS**

Vulcan Life Ins. Co. v. McDuffie, 57 Ala. App. 634, 331 So. 2d 280 (1976).

Prudential Cas. Co. v. Curry, 10 Ala. App. 642, 65 So. 852 (1914).

West's Key Number Digest, Insurance ⇨2590(2), 2595(3).

Bibb Allen, Allen's Alabama Liability Insurance Handbook §§ 8:5, 8:6 (2d ed. 2008).

10 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 140.48 (3d ed. 2012).

Am. Jur. 2d, Insurance §§ 590, 591, 1248, 1258.

**APJI 20.34 ACCIDENT POLICY—INSURED
PARTICIPATING IN AN ASSAULT
[PL]**

(Name of defendant) says (name of plaintiff) should not recover because (name of plaintiff/name of deceased)'s (injury/death) was not (an accident) (the result of accidental means).

If you decide:

1. That (name of plaintiff/name of deceased) was the aggressor and attacked (name);
2. That (name) struck back in a way (name of plaintiff/name of deceased) did not reasonably expect; and
3. That (name) (injured/killed) (name of plaintiff/name of deceased)

You must find that (name of plaintiff/name of deceased)'s (injury/death) was (an accident) (the result of accidental means).

Approved March 8, 2013

Notes on Use

Use this instruction when the claim is on an accidental death policy of insurance or a life insurance policy where double indemnity benefits are claimed. This instruction has significance in those cases when the defendant relies on a provision in the policy excluding liability when the insured was killed as the result of or while participating in an assault.

References

Howard v. Southern Life and Health Ins. Co., 474 So. 2d 1109, 1112 (Ala. 1985).

Provident Life & Acc. Ins. Co. v. Hanna, 294 Ala. 37, 311 So. 2d 294 (1975).

APJI 20.34**ALABAMA PATTERN JURY INSTRUCTIONS**

Aetna Life Ins. Co. v. Beasley, 272 Ala. 153, 130 So. 2d 178 (1961).

O'Bar v. Southern Life & Health Ins. Co., 232 Ala. 459, 168 So. 580 (1936).

United Sec. Life Ins. Co. v. Clark, 40 Ala. App. 542, 115 So. 2d 911 (1959).

American Life Ins. Co. v. Morris, 37 Ala. App. 438, 72 So. 2d 414 (1953).

West's Key Number Digest, Insurance ⚡2590 (2), 2595(3).

Bibb Allen, Allen's Alabama Liability Insurance Handbook §§ 8:5, 8.6 (2d ed. 2008).

**APJI 20.35 ACCIDENT POLICY—LOSS
CAUSED BY DISEASE [PL]**

(Name of insurer) says (name of plaintiff) cannot recover because (name of insured)'s death did not result from (an accident) (accidental means). (Name of insurer) says at the time (name of deceased) was injured (he/she) had (state the infirmity or disease) and it contributed to (his/her) death.

If you decide that when (name of deceased) was injured (he/she) had (state the infirmity or disease) and that it was an efficient contributing cause of (his/her) death, (name of plaintiff) cannot recover.

Approved March 8, 2013

Notes on Use

This instruction is specific to policy language about the so-called “additional clause”, *Union Cent. Life Ins. Co. v. Scott*, 286 Ala. 10, 236 So. 2d 328, 330 (1970) or “special clause”, *First Nat'l Bank v. Equitable Life Assur. Soc. of U. S.*, 225 Ala. 586, 144 So. 451 (1932) in an insurance policy that further defines what is not an accident under the policy.

Use this instruction when the claim is on a policy that covers accidental injuries and the policy provides: (1) that the injury must have been effected solely by accident or accidental means; (2) that the injuries must be caused directly or independently of all other causes; or (3) that no benefit is payable if injuries result directly or indirectly from bodily or mental infirmity or disease of any kind.

References

Union Cent. Life Ins. Co. v. Scott, 286 Ala. 10, 236 So. 2d 328 (1970).

Independent Life and Acc. Ins. Co. of Jacksonville, Fla., v. Maddox, 284 Ala. 532, 226 So. 2d 315 (1969).

Liberty Nat'l Life Ins. Co. v. Reid, 276 Ala. 25, 158 So. 2d 667 (1963).

Emergency Aid Ins. Co. v. Connell, 258 Ala. 521, 63 So. 2d 603 (1952).

Adkins v. Metropolitan Life Ins. Co., 235 Ala. 417, 179 So. 382 (1938).

First Nat'l Bank v. Equitable Life Assur. Soc. of U. S., 225 Ala. 586, 144 So. 451 (1932).

Orton v. Liberty Nat'l Life Ins. Co., 402 So. 2d 978 (Ala. Civ. App. 1980), rev'd on other grounds, *Ex parte Orton*, 402 So. 2d 980 (Ala. 1980).

Collins v. Metropolitan Life Ins. Co., Inc., 729 F.2d 1402 (11th Cir. 1984).

Forbes v. Reliance Standard Life Ins. Co., 1999 WL 34793090 (S.D. Ala. 1999). Not reported in F.Supp.2d.

West's Key Number Digest, Insurance ⌘2589(1).

10 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* §§ 141:14, 141:26, 141:30, 141:74 (3d ed. 2012).

Am. Jur. 2d Insurance § 609.

**APJI 20.36 ACCIDENT POLICY—
INTENTIONAL ACT [PL]**

Defendant (name of defendant) says that there is no insurance coverage because the (injuries to/death of) the insured resulted from an intentional act of (the insured/a third person).

The intentional act of the (insured/third person) must be the result of a course of action knowingly entered into by the (insured/third person) and the insured's injury is the probable consequence of the action.

Notes on Use

Use this instruction when the policy has an exclusion or limitation on coverage for injuries or death resulting from an intentional act. The particular language of the policy may be inserted into the instruction.

References

Boyd v. Great Cent. Ins. Co., 401 So. 2d 19 (Ala. 1981).

Lawler Mach. & Foundry Co., Inc. v. Pacific Indem. Ins. Co., 383 So. 2d 156 (Ala. 1980).

Continental Cas. Co. v. Meadows, 242 Ala. 476, 7 So. 2d 29 (1942).

National Life & Acc. Ins. Co. v. Hannon, 214 Ala. 663, 108 So. 575 (1926), appeal after remand, 22 Ala. App. 483, 118 So. 1170 (1928), cert. denied, 218 Ala. 174, 118 So. 172 (1928).

Continental Cas. Co. v. Cunningham, 188 Ala. 159, 66 So. 41 (1914).

West's Key Number Digest, Insurance ⌘2672, 2675.

Bibb Allen, Allen's Alabama Liability Insurance Handbook § 8.04 (2d ed. 2008).

Am. Jur. 2d Insurance § 1247.

APJI 20.37 BAD FAITH—ELEMENTS [PL]

Plaintiff (name of plaintiff) says that Defendant (name of defendant) broke the obligation of good faith and fair dealing because it did not pay the claim (name of plaintiff) made under (his/her/its) insurance policy.

To recover on this claim, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

(1) There was an insurance contract between (name of plaintiff) and (name of defendant);

(2) (Name of plaintiff) made a claim for a loss covered under the policy (name of defendant) was obligated to pay;

(3) (Name of defendant) intentionally refused to pay (name of plaintiff)'s claim;

(4) (Name of defendant) had no reasonably legitimate or arguable reason to refuse to pay the claim at the time the claim was denied; and,

(5) That (name of defendant) had actual knowledge that there was no reasonably legitimate, arguable or debatable reason, or

(Name of defendant) intentionally or recklessly failed to determine whether there was a legitimate or arguable reason to refuse to pay the claim.

(An insurance company's refusal to pay may either be actual or constructive. Circumstances that amount to a constructive refusal to pay are: (1) the passage of time from when (name of plaintiff) made the claim is so great that (name of defendant)'s delay in paying the claim is refusal to pay; or (2) a delay in time from when (name of plaintiff) made the claim and wrongful intent by (name of defendant) is refusal to pay.)

If (name of plaintiff) proved all of these things, you must

find for (name of plaintiff) and determine what amount of money to award (him/her/it) for the harm.

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved October 11, 2013

Revised October 10, 2014

Notes on Use

Use this instruction when the action is for what was formerly known as an abnormal bad faith. This is a stand-alone instruction. It addresses theories other than a simple failure to investigate.

On September 27, 2013, the Supreme Court of Alabama decided *State Farm Fire and Cas. Co. v. Brechbill*, 144 So. 3d 248 (Ala. 2013). *Brechbill* is what was formerly called an abnormal bad faith case. In summary, the Court held there is one cause of action for bad faith; in a bad faith case the insurer must have lacked an arguable or debatable reason to deny the claim; and failure to investigate is a conditional fifth element of a claim for bad faith.

The plaintiff can recover damages for emotional distress and economic loss. *Standard Plan, Inc. v. Tucker*, 582 So. 2d 1024 (Ala. 1991).

Use APJI 11.03, Punitive damages, in a case where punitive damages are claimed.

References

State Farm Fire and Cas. Co. v. Brechbill, 144 So. 3d 248 (Ala. 2013).

White v. State Farm Fire & Cas. Co., 953 So. 2d 340, 348 (Ala. 2006).

Nat'l Ins. Ass'n v. Sockwell, 829 So. 2d 111 (Ala. 2002).

State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 306 (Ala. 1999).

Standard Plan, Inc. v. Tucker, 582 So. 2d 1024 (Ala. 1991).

Intercontinental Life Ins. Co. v. Lindblom, 571 So. 2d 1092 (Ala. 1990), judgment vacated, 499 U.S. 956 (1991), judgment reinstated on remand, 598 So. 2d 886 (Ala. 1992), cert. denied, 506 U.S. 869 (1992).

Thomas v. Principal Financial Group, 566 So. 2d 735, 62 Ed. Law Rep. 1269 (Ala. 1990).

United American Ins. Co. v. Brumley, 542 So. 2d 1231 (Ala. 1989).

Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050 (Ala. 1987).

Blue Cross and Blue Shield of Alabama v. Granger, 461 So. 2d 1320 (Ala. 1984).

Chavers v. Nat'l Sec. Fire & Cas. Co., 405 So. 2d 1 (Ala. 1981).

Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981).

Thomas v. Safeway Insurance Company of Alabama, Inc., 244 So. 3d 965 (Ala. Civ. App. 2017).

West's Key Number Digest, Insurance ⇨3373, 3334 to 3382, 3416.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 21.05 (5th ed. 2010).

Bibb Allen, Allen's Alabama Liability Insurance Handbook § 14.02 (2d ed. 2008).

Jenelle Mims Marsh, Alabama Law of Damages § 36:17 (6th ed. 2012).

Am. Jur. 2d, Insurance §§ 1736 to 1740.

**APJI 20.38 BAD FAITH—INFERENCE OF
ACTUAL KNOWLEDGE [PL]**

As you have been instructed, the burden is upon (name of plaintiff) to reasonably satisfy you from the evidence that (name of defendant) had actual knowledge that there was no reasonably legitimate, arguable, or debatable reason for its refusal to pay. As an alternative to, and substitute for providing the element of actual knowledge on the part of (name of defendant), (name of plaintiff) may prove instead that (name of defendant) intentionally failed to determine whether there was a reasonably legitimate, arguable, or debatable reason to refuse to pay (name of plaintiff)'s claim. In making that determination, the relevant question before you would be whether the claim was properly investigated and whether the results of the investigation were subjected to a reasoned and informed evaluation and review before the claim was denied. Furthermore, (name of defendant)'s knowledge of the lack of a reasonably legitimate, arguable, or debatable reason for its refusal to pay, or its reckless disregard of the lack of such a reason, may be inferred and imputed to an insurance company where it has exhibited a reckless indifference to facts or proof submitted to it by the insured.

Approved October 11, 2013

Revised October 10, 2014

Notes on Use

Important: See APJI 20.37 notes on use.

References

White v. State Farm Fire & Cas. Co., 953 So. 2d 340, 348 (Ala. 2006).

Nat'l Ins. Ass'n v. Sockwell, 829 So. 2d 111 (Ala. 2002).

State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 306 (Ala. 1999).

Standard Plan, Inc. v. Tucker, 582 So. 2d 1024 (Ala. 1991).

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ALABAMA PATTERN JURY INSTRUCTIONS

Intercontinental Life Ins. Co. v. Lindblom, 571 So. 2d 1092 (Ala. 1990), judgment vacated, 499 U.S. 956 (1991), judgment reinstated on **remand**, 598 So. 2d 886 (Ala. 1992), cert. denied, 506 U.S. 869 (1992).

Thomas v. Principal Financial Group, 566 So. 2d 735, 62 Ed. Law Rep. 1269 (Ala. 1990).

United American Ins. Co. v. Brumley, 542 So. 2d 1231 (Ala. 1989).

Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050 (Ala. 1987).

Blue Cross and Blue Shield of Alabama v. Granger, 461 So. 2d 1320 (Ala. 1984).

Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1 (Ala. 1981).

Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981).

West's Key Number Digest, Insurance ⇌3373, 3334 to 3382, 3419.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 21.05 (5th ed. 2010).

Bibb Allen, Allen's Alabama Liability Insurance Handbook § 14.02 (2d ed. 2008).

Jenelle Mims Marsh, Alabama Law of Damages § 36:17 (6th ed. 2012).

Am. Jur. 2d, Insurance §§ 1736 to 1740.

APJI 20.39 to 20.42

Reserved

**APJI 20.43 BAD FAITH—EVIDENCE
CONSIDERED [PL] [NEW]**

To determine whether (name of defendant)'s denial of (name of plaintiff)'s claim was justified; you can consider only the information (name of defendant) knew at the time it denied the claim.

Approved May 10, 2013

Notes on Use

The insurance company's decision to deny a claim under an insurance policy must be judged by what was before it at the time the decision was made. Once the bad faith has occurred, the insurance company cannot later seek to justify its denial by gathering information which it should have had in the first place.

References

Blackburn v. Fidelity & Deposit Co., 667 So. 2d 661 (Ala. 1995).

Davis v. Cotton States Mut. Ins. Co., 604 So. 2d 354 (Ala. 1992).

Aetna Life Insurance Co. v. Lavoie, 505 So. 2d 1050 (Ala. 1987).

Insurance Co. of North America v. Citizens Bank of Thomasville, 491 So. 2d 880 (Ala. 1986).

National Sav. Life Ins. Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982).

West's Key Number Digest, Insurance ⇨3336.

Bibb Allen, Allen's Alabama Liability Insurance Handbook 14.02[7] (2d ed. 2008).

**APJI 20.44 BAD FAITH—RELIANCE ON
ADVICE OF COUNSEL [PL]**

Defendant (name of defendant) says it did not breach the obligation of good faith and fair dealing because it relied in good faith on the advice of its lawyer. The company must prove:

- (1) It made a full disclosure of the facts to its lawyer;
- (2) It asked its lawyer's advice whether the action it planned to take was legal;
- (3) It received advice that its conduct was legal; and
- (4) It relied in good faith on the advice of its lawyer.

If (name of defendant) proves to your reasonable satisfaction that it relied in good faith on advice of its lawyer, you must find for (name of defendant).

Approved May 10, 2013

Notes on Use

Use this instruction when the insurer says it relied on the advice of its lawyer when it denied the claim or benefits. Reliance on advice of a lawyer is defensive matter, but it is not an affirmative defense.

The user must modify the instruction if, for instance, the lawyer advises the answer is uncertain and advises the insurer file a declaratory judgment action to determine its rights and obligations under the insurance policy. *Davis v. Cotton States Mut. Ins. Co.*, 604 So. 2d 354 (Ala. 1992).

References

Ex parte Meadowbrook Ins. Grp., 987 So. 2d 540, 550 (Ala. 2007) (waiver of attorney-client privilege).

Davis v. Cotton States Mut. Ins. Co., 604 So. 2d 354, 359 (Ala. 1992).

Chavers v. Nat'l Sec. Fire & Cas. Co., 405 So.2d 1 (Ala. 1981).

Finger v. State Farm Fire & Cas. Ins. Co., Civil Action No. 10-00192-KD-B, 2011 WL 2621020, *4 (S. D. Ala. 2011) (not reported in F. Supp. 3d).

West's Key Number Digest, Privileged Communications and Confidentiality ⇐100 to 178.

Bibb Allen, Allen's Alabama Liability Insurance Handbook § 13.21 (2d ed. 2008).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 21.08 (5th ed. 2010).

Jenelle Mims Marsh, Alabama Law of Damages § 27:6 (b) n. 31 (6th ed. 2012).

William A. Schroeder & Jerome A. Hoffman, Alabama Evidence § 5:4 (3d ed. 2012).

II Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence §§ 388.01 and.02 (6th ed. 2009).

Ala. R. Evid. 502, 510.

Am. Jur. 2d. Witnesses §§ 334 to 342, 412.

**APJI 20.45 NEGLIGENT FAILURE TO SETTLE
[PL]**

Plaintiff (name of plaintiff) says (he/she/it) had an insurance policy with defendant (name of defendant). (Name of plaintiff) further says (name of first plaintiff) sued (name of plaintiff) and the claims in the lawsuit were covered under the policy. (Name of plaintiff) says (name of defendant) negligently failed to settle the lawsuit. (Name of plaintiff) says (he/she/it) was harmed because (name of person who brought suit) got a verdict for (\$ ____.) which was more than the limits of (name of plaintiff)'s insurance policy.

To recover on this claim, (name of plaintiff) must prove (name of defendant) was negligent when it did not settle the lawsuit. (Name of defendant) was negligent if it failed to do something that a reasonably prudent insurance company would have done in a similar situation.

To decide whether (name of defendant) was negligent, you should consider the following:

When an insurance company evaluates a case and then decides not to settle, its decision must be thoroughly honest, intelligent, and objective. The insurance company has expertise in settling cases; therefore, its decision not to settle must be realistic when judged against its expertise. When applying this expertise, the company must consider all factors that advise settlement to protect its insured. The view of the company or its lawyer is one important factor, but a good faith evaluation requires more. Some of the factors the company must consider are:

1. The strengths and weaknesses of the evidence that each side will present at trial;
2. The possible range of any verdict against the insured;
3. The history of jury verdicts in similar cases where the case will be tried; and

4. The relative appearance, persuasiveness, and likely appeal of the claimant, the insured, and the witnesses who will appear at trial.

If the company did not settle within policy limits when it had an opportunity to settle, that fact alone does not prove it was negligent. You must consider all the evidence.

If (name of plaintiff) proved (name of defendant) negligently failed to settle the lawsuit, you must find for (name of plaintiff) and determine what amount of money will fairly and reasonably compensate (him/her/it) for the harm.

If (name of plaintiff) did not prove (name of defendant) negligently failed to settle the lawsuit, you must find for (name of defendant).

Approved April 5, 2013

Notes on Use

Use this instruction when the plaintiff claims the insurance company negligently failed to settle within policy limits a lawsuit brought against the plaintiff. This instruction does not apply when the insurer defended under a reservation of rights. It combines APJI 20.40, 20.41, and 20.42 (3d ed. 2012).

References

Evans v. Mutual Assur., Inc., 727 So.2d 66 (Ala. 1999).

State Farm Mut. Auto. Ins. Co. v. Hollis, 554 So. 2d 387 (Ala. 1989).

Nationwide Mut. Ins. Co. v. Smith, 280 Ala. 343, 194 So.2d 505 (1967).

Hartford Acc. & Indem. Co. v. Cosby, 277 Ala. 596, 173 So. 2d 585 (1965) (addressing expert testimony in negligent or bad faith failure to settle cases).

Waters v. American Cas. Co. of Reading, Pa., 261 Ala. 252, 73 So. 2d 524 (1953).

Carrier Exp., Inc. v. Home Indem. Co., 860 F. Supp. 1465 (N.D. Ala. 1994).

West's Key Number Digest, Insurance ⇐3350.

Bibb Allen, Allen's Alabama Liability Insurance Handbook §§ 13.01 to 13.09 (2d ed. 2008).

Ally W. Howell, Alabama Personal Injury and Torts § 13:4 (2d ed. 1997).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 21.11 (5th ed. 2010).

Jenelle Mims Marsh, Alabama Law of Damages § 27:6 (6th ed. 2012).

Am. Jur. 2d Insurance §§ 1390 to 1395.

**APJI 20.46 BREACH OF ENHANCED
OBLIGATION—DEFENSE UNDER
RESERVATION OF RIGHTS [PL]**

Plaintiff (name of plaintiff) says (he/she/it) had a policy of liability insurance with (name of defendant). (Name of plaintiff) further says (name of first plaintiff) sued (name of plaintiff) for (describe the claims), and (name of defendant) defended the lawsuit but defended it under (reservation of rights/a non-waiver agreement). Finally, (name of plaintiff) says (name of defendant) had the obligation to defend the lawsuit in good faith; it did not defend in good faith; and as a result (state how plaintiff was harmed).

Reservation of rights: The insurance company defends the lawsuit but reserves the right to contest whether the claims against the insured are covered under the policy. The insurance company must give the insured timely notice that the defense is under reservation of rights.

Non-waiver agreement: The insurance company and the insured agree the insurance company will defend the lawsuit and reserve its right to contest whether the claims against the insured are covered under the policy.

The insurance policy gives the insurance company the right to control the defense of a lawsuit filed against the insured. Because it has this right, it has an obligation to defend the lawsuit in good faith. This means the insurance company must look out for the insured's best interest rather than look out for its best interest.

(Name of defendant) met its obligation of good faith if:

1. It made a thorough investigation of the claims against (name of plaintiff) and the nature and severity of (name of first plaintiff)'s harm and damages;
2. It hired competent lawyer(s) to defend (name of plaintiff). (Name defendant) and the lawyer(s) understood

that only (name of plaintiff) was the lawyer(s)'s client and their conduct showed that understanding;

3. It kept (name of plaintiff) informed about all the developments relevant to coverage under the policy and the progress of the lawsuit. This information includes a realistic and periodic evaluation of (name of plaintiff)'s chances to win or lose the lawsuit; any activity involving settlement and all offers of settlement as they were made; and,

4. It did not take any action that showed it had a greater concern for its monetary interest than for (name of plaintiff)'s financial risk.

To recover on this claim, (name of plaintiff) must prove to your reasonable satisfaction that (name of defendant) failed to do some or all of these things and its failure caused (name of plaintiff)'s harm.

If (name of plaintiff) proved that (name of defendant) failed to do some or all of the things to meet its obligation of good faith, you must find for (name of plaintiff) and determine what amount of money to award (him/her/it) for the harm.

If (name of plaintiff) did not prove that (name of defendant) failed to meet its obligation of good faith, you must find for (name of defendant).

Approved June 7, 2013

Notes on Use

Use this instruction when it is undisputed the insurer gave the insured notice that the defense was under reservation of rights or the defense was under a non-waiver agreement. An insured may have constructive notice that the defense was under reservation of rights. *Shelby Steel Fabricators, Inc. v. United States Fid. & Guar. Co.*, 569 So. 2d 309 (Ala. 1990). The user should modify the instruction if notice is an issue.

The breach of an insurer's enhanced obligation of good faith

arises out of the insurance contract and is a contract claim. *Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co.*, 839 So. 2d 614 (Ala. 2002). The Alabama appellate courts have not decided the types of recoverable damages. A United States District Court has awarded compensatory damages, including damages for mental anguish, punitive damages, attorneys' fees and prejudgment interest for breach of the obligation. *Carrier Express, Inc. v. Home Indem. Co.*, 860 F. Supp. 1465 (N.D. Ala. 1994). See, *Aetna Cas. & Sur. Co. v. Mitchell Bros., Inc.*, 814 So. 2d 191, 202–03 (Ala. 2001) (Lyons, J. dissenting).

References

Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200 (Ala. 2009) (insurer not vicariously liable for appointed lawyer's conduct).

Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co., 839 So. 2d 614 (Ala. 2002).

Aetna Cas. & Sur. Co. v. Mitchell Bros., 814 So. 2d 191 (Ala. 2001).

Shelby Steel Fabricators, Inc. v. United States Fid. & Guar. Co., 569 So. 2d 309 (Ala. 1990).

L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298 (Ala. 1987).

West's Key Number Digest, Insurance ⇨2926 to 2931, 3541.

William E. Shreve, Jr., *Determining an Insurer's Duty to Defend*, 74 Ala. Law 239 (July 2013).

Stephen E. Whitehead and Jennifer W. Wall, *The Insurance Tripartite Relationship: Who Is My Client Anyway?*, 69 Ala. Law. 416 (Nov. 2008).

Karen O. Bowdre, *Enhanced Obligation of Good Faith: A Mine Field of Unanswered Questions After L & S Roofing Supply Co.*, 50 Ala. L. Rev. 755 (1999).

Ally W. Howell, *Alabama Personal Injury and Torts*, § 13:4 (2012).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 21.11, 21.12 (5th ed. 2010).

APJI 20.46**ALABAMA PATTERN JURY INSTRUCTIONS**

Bibb Allen, *Allen's Alabama Liability Insurance Handbook*, §§ 4.01 to 4.11 (2d ed. 2008).

Am. Jur. 2d Insurance §§ 1396 to 1399, 1400, 1412, 1416.

**APJI 20.47 ARSON BY INSURED—
AFFIRMATIVE DEFENSE [PL]**

(Name of insurer) says it does not have to pay the (claim/benefits) because plaintiff (name of insured) (burned/had someone burn) (describe the insured property).

(Name of insurer) does not have to pay the (claim/benefits) if it proves:

- (1) The fire was intentionally set;
- (2) (Name of insured) or someone acting at (his/her/its) direction intentionally set the fire; and,
- (3) (Name of insured)'s motive for the arson.

You may consider any evidence that shows that (name of insured) was involved in or that connects (him/her/it) to the fire.

If (name of insurer) proved this defense to your reasonable satisfaction you must find for (name of insurer).

Approved May 10, 2013

Notes on Use

Use this instruction when the insurer pleads the affirmative defense that the insured burned or had someone burn the insured property. This instruction may be used with APJI 20.21 when the insurer pleads the affirmative defense of misrepresentation after loss.

References

S & W Props., Inc. v. American Motorists Ins. Co., 668 So. 2d 529 (Ala. 1995).

Bush v. Alabama Farm Bureau Mut. Cas. Ins. Co., 576 So.2d 175 (Ala. 1991).

Mueller v. Hartford Ins. Co. of Ala., 475 So. 2d 554 (Ala. 1985).

APJI 20.47**ALABAMA PATTERN JURY INSTRUCTIONS**

West's Key Number Digest, Insurance ⚙️2199.

17A Lee R. Russ & Thomas F. Segalla, Couch on Insurance
§ 254:118 (3d ed. 2012).

Am. Jur. 2d Insurance §§ 503, 2026.

APJI 20.48 to 20.49**Reserved**

**APJI 20.50 UNINSURED MOTORIST—
ELEMENTS [PL]**

Plaintiff (name of plaintiff) says (he/she) (had a policy/ was covered by a policy) of insurance with defendant (name of defendant), and the policy has what is commonly called uninsured motorist coverage. This means the policy pays for (name of plaintiff)'s harm caused by an uninsured motorist if the motorist is at fault.

(Name of plaintiff) says (name of other driver) (negligently/wantonly) drove a (car/truck/etc.) and caused (name of plaintiff) harm. (Name of plaintiff) says (name of other driver) was an uninsured motorist because (he/she) did not have liability insurance. Because (name of other driver) did not have liability insurance, (name of plaintiff) says (he/she) can recover under the policy.

(Name of defendant) says (name of plaintiff) cannot recover because (state the reasons and/or affirmative defenses).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff) (had an insurance policy/was covered by an insurance policy) in effect with (name of defendant) and the policy had uninsured motorist coverage,
2. (Name of other driver) did not have liability insurance,
3. That (name of other driver) (negligently/wantonly) drove a (car/truck/etc.); and,
4. (Name of other driver)'s (negligent/wanton) conduct caused (name of plaintiff)'s harm.

If (name of plaintiff) proved all of these things you will find for (him/her) unless (name of defendant) proved an affirmative defense. If (name of defendant) proved an affirmative defense you must find for it.

If you find for (name of plaintiff), you must then determine how much money to award (him/her).

Approved June 7, 2013

Notes on Use

Use this instruction when the insurer is the only party defendant.

A plaintiff can sue only the carrier, the carrier and the uninsured motorist, or the plaintiff can give the carrier notice that plaintiff intends to sue the uninsured motorist and send the suit papers to the carrier. If the carrier is not a party, instruct only with the instructions in chapters 28, 29, and 30, as appropriate.

If the carrier and the uninsured motorist are parties, use APJI 20.51.

See APJI 20.54 when the incident involves a hit-and-run or phantom vehicle.

References

Ala. Code § 32-7-23 (1975) (West's Alabama Code) requires insurers to offer uninsured and underinsured benefits. The purpose of the Uninsured Motorist Statute is to provide coverage for the protection of persons insured thereunder who are legally entitled to recover damages from the owners or operators of motor vehicles. Any provision in an insurance policy that restricts the coverage required in the statute is void.

In Alabama, a motorist may be declared to be uninsured for several reasons. For example, the insurance policy may fail to cover the plaintiff's injury, applicable policy limits may be set below the statutory minimum or the motorist's insurer may have become insolvent after the insurance policy has been issued. Other vehicle operators have been deemed uninsured when the owner or operator of the vehicle is unknown or when the offending vehicle or operator is underinsured regarding the claimant's injuries. The Uninsured Motorist Statute, Ala. Code § 32-7-23(b) (1975) (West's Alabama Code), defines the term uninsured motor vehicle as including motor vehicles which:

- (1) Neither the owner nor the operator carries bodily injury liability insurance;

(2) Any applicable policy liability limits for bodily injury are below the minimum required under Section 32-7-6;

(3) The insurer becomes insolvent after the policy is issued so there is no insurance applicable to, or at the time of, the accident; and

(4) The sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident is less than the damages which the injured person is legally entitled to recover.

Travelers Indemnity Company of Connecticut v. Worthington, 252 So. 3d 645 (Ala. 2017).

Easterling v. Progressive Specialty Insurance Company, 251 So. 3d 767 (Ala. 2017).

Bailey v. Progressive Specialty Ins. Co., 72 So. 3d 587 (Ala. 2011).

Harshaw v. Nationwide Mut. Ins. Co., 834 So. 2d 762 (Ala. 2002).

Shelter Mut. Ins. Co. v. Barton, 822 So. 2d 1149 (Ala. 2001).

Motors Ins. Corp. v. Williams, 576 So. 2d 218 (Ala. 1991).

Watts v. Preferred Risk Mut. Ins. Co., 423 So. 2d 171 (Ala. 1982).

Alabama Farm Bureau Mut. Cas. Ins. Co. v. Pigott, 393 So. 2d 1379 (Ala. 1981).

Alabama Farm Bureau Mut. Cas. Ins. Co. v. Cain, 387 So. 2d 195 (Ala. 1980).

Billups v. Alabama Farm Bureau Mut. Cas. Ins. Co., 352 So. 2d 1097 (Ala. 1977), appeal after remand, 366 So. 2d 1109 (Ala. 1979).

Holloway v. Nationwide Mut. Ins. Co., 376 So. 2d 690 (Ala. 1979).

Barnes v. Tarver, 360 So. 2d 953 (Ala. 1978).

United Servs. Auto. Ass'n v. Smith, 57 Ala. App. 506, 329 So. 2d 562 (1976).

West's Key Number Digest, Insurance ⇨2772 to 2816.

Ally W. Howell, *Personal Injury and Torts* § 13:7 (2012).

1 Michael L. Roberts and Gregory S. Cusimano, *Alabama Tort Law* §§ 4.01 to 4.05 (5th ed. 2010).

Bibb Allen, *Allen's Alabama Liability Insurance Handbook* §§ 21.01 to 21.13 (2d ed. 2008).

Am. Jur. 2d *Automobile Insurance* §§ 35 to 45, 314 to 347.

Walter J. Price III and Eris Bryan Paul, *More Uninsured/Underinsured Motorist Coverage—An Addition to the Lawyer's Desk Reference*, 74 Ala. Law. 107 (Mar. 2013).

Walter J. Price, III and David M. Fleming, "Uninsured/Underinsured Motorist Coverage—A Desk Reference for Alabama Lawyers", 69 Ala. Law. 203 (May 2008).

Julie E. McMakin, "Recent Developments: Insurance Law: *State Farm Mutual Automobile Insurance Co. v. Bennett*: In a Claim Against an Insured's Uninsured Motorist Coverage, Will an Insurance Provider Prevail by Asserting the Same Defenses as the Tortfeasor?", 31 Am. J. Trial Advoc. 459 (Fall 2007).

**APJI 20.51 UNINSURED MOTORIST—
ELEMENTS—UNINSURED
MOTORIST AND CARRIER ARE
PARTIES [PL]**

There are two defendants in this case: defendant (name of other driver) and defendant (name of insurer). You will decide plaintiff's (name of plaintiff) claims against both (name of other driver) and (name of insurer).

Plaintiff (name of plaintiff) says (he/she) (had a policy/was covered by a policy) of insurance with defendant (name of defendant), and the policy has what is commonly called uninsured motorist coverage. This means the policy pays for (name of plaintiff)'s harm caused by an uninsured motorist if the motorist is at fault.

(Name of plaintiff) says (name of other driver) (negligently/wantonly) drove a (car/truck/etc.) and caused (him/her) harm. (Name of plaintiff) says (name of other driver) was an uninsured motorist because (he/she) did not have liability insurance. Because (name of other driver) did not have liability insurance, (name of plaintiff) says (he/she) can recover under the policy.

(Names of defendants) say (name of plaintiff) cannot recover because (state the reasons and/or affirmative defenses).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff) (had an insurance policy/was covered by an insurance policy) in effect with (name of defendant) and the policy had uninsured motorist coverage,
2. (Name of other driver) did not have liability insurance,
3. That (name of other driver) (negligently/wantonly) drove a (car/truck/etc.); and,

APJI 20.51**ALABAMA PATTERN JURY INSTRUCTIONS**

4. (Name of other driver)'s (negligent/wanton) conduct caused (name of plaintiff)'s harm.

If (name of plaintiff) proved all of these things you will find for (him/her) unless (names of defendants) proved an affirmative defense. If (names of defendants) proved an affirmative defense you must find for them.

If you find for (name of plaintiff), you must then determine how much money to award (him/her).

Approved June 7, 2013

Notes on Use

Use this instruction when the uninsured driver and the carrier are defendants.

The language of the uninsured motorist coverage should be reviewed.

See APJI 20.54 when the incident involves a hit-and-run or phantom vehicle.

References

See the references in APJI 20.50.

**APJI 20.52 UNDERINSURED MOTORIST—
ELEMENTS—CARRIER IS ONLY
PARTY [PL]**

Plaintiff (name of plaintiff) says (he/she) (had a policy of insurance/was covered by a policy of insurance) with defendant (name of defendant), and the policy has what is commonly called underinsured motorist coverage. An underinsured motorist is a person who has liability insurance, but (name of plaintiff) says the amount of insurance is not enough to make (him/her) whole.

(Name of plaintiff) says (name of other driver) (negligently/wantonly) drove a (car/truck/etc.) and caused (him/her) harm. (Name of plaintiff) says (name of other driver) was an underinsured motorist. Because (name of other driver) did not have enough liability insurance coverage, (name of plaintiff) says (he/she) can recover under the policy.

(Name of defendant) says (name of plaintiff) cannot recover because (state the reasons and/or affirmative defenses).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff) (had an insurance policy/was covered by an insurance company) in effect with (name of defendant) and the policy had underinsured motorist coverage;
2. (Name of other driver) had liability insurance;
3. That (name of other driver) (negligently/wantonly) drove a (car/truck/etc.); and,
4. (Name of other driver)'s (negligent/wanton) conduct caused (name of plaintiff)'s harm.

If (name of plaintiff) proved all of these things you will

find for (him/her) unless (name of defendant) proved an affirmative defense. If (name of defendant) proved an affirmative defense you must find for it.

If you find for (name of plaintiff), you must then determine how much money to award (him/her) for the harm caused by (name of other driver). When deciding how much money to award, the amount of (name of other driver)'s liability insurance and the amount of (name of plaintiff)'s underinsured motorist insurance are not important.

Approved June 7, 2013

Notes on Use

Use this instruction when the carrier is the only party. When the carrier and the underinsured motorist are parties, use APJI 20.53.

When the limits of the underinsured motorist's liability policy are not disputed, the amount of the limits is not admissible at trial. Bibb Allen, *Allen's Alabama Liability Insurance Handbook* § 21.07 [3] (2d ed. 2008).

References

Ala. Code § 32-7-23(b)(4) (1975) (West's Alabama Code).

Ex parte Edgar, 543 So. 2d 682 (Ala. 1989).

Auto-Owners Ins. Co. v. Hudson, 547 So. 2d 467 (Ala. 1989).

State Farm Mut. Auto. Ins. Co. v. Fox, 541 So. 2d 1070 (Ala. 1989).

Hardy v. Progressive Ins. Co., 531 So. 2d 885 (Ala. 1988).

West's Key Number Digest, Insurance ¶2772 to 2816.

Ally W. Howell, *Alabama Personal Injury and Torts* § 13:7 (2d ed. 1997).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 4.03 (5th ed. 2010).

Bibb Allen, *Allen's Alabama Liability Insurance Handbook* §§ 21.01 to 21.13 (2d ed. 2008).

Am. Jur. 2d *Automobile Insurance* §§ 35 to 45, 314 to 347.

Walter J. Price III and Eris Bryan Paul, *More Uninsured/Underinsured Motorist Coverage—An Addition to the Lawyer's Desk Reference*, 74 Ala. Law. 107 (Mar. 2013).

Walter J. Price, III and David M. Fleming, "Uninsured/Underinsured Motorist Coverage—A Desk Reference for Alabama Lawyers", 69 Ala. Law. 203 (May 2008).

**APJI 20.53 UNDERINSURED MOTORIST—
ELEMENTS—UNDERINSURED
MOTORIST AND CARRIER ARE
PARTIES [PL]**

There are two defendants in this case: defendant (name of other driver) and defendant (name of insurer). You will decide plaintiff's (name of plaintiff) claims against both (name of other driver) and (name of insurer).

(Name of plaintiff) says (he/she) (had a policy of insurance/was covered by a policy of insurance) with (name of defendant), and the policy has what is commonly called underinsured motorist coverage. An underinsured motorist is a person who is covered by liability insurance, but (name of plaintiff) says the amount of insurance is not enough to make (him/her) whole.

(Name of plaintiff) says (name of other driver) (negligently/wantonly) drove a (car/truck/etc.) and caused (him/her) harm. (Name of plaintiff) says (name of other driver) was an underinsured motorist. Because (name of other driver) did not have enough liability insurance coverage, (name of plaintiff) says (he/she) can recover under the policy.

(Names of defendants) say (name of plaintiff) cannot recover because (state the reasons and/or affirmative defenses).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff) (had an insurance policy/was covered by an insurance policy) in effect with (name of defendant) and the policy had underinsured motorist coverage;

2. (Name of other driver) had liability insurance;

3. That (name of other driver) (negligently/wantonly) drove a (car/truck/etc.); and,

4. (Name of other driver)'s (negligent/wanton) conduct caused (name of plaintiff)'s harm.

If (name of plaintiff) proved all of these things you will find for (him/her) unless (names of defendants) proved an affirmative defense. If (names of defendants) proved an affirmative defense you must find for them.

If you find for (name of plaintiff), you must then determine how much money to award (him/her) for the harm caused by (name of other driver). When deciding how much money to award, the amount of (name of other driver)'s liability insurance coverage and the amount of (name of plaintiff)'s underinsured motorist insurance are not important.

Approved June 7, 2013

Notes on Use

Use this instruction when the carrier and the tort feisor are parties.

References

See the references to APJI 20.51.

Medlock v. Safeway Ins. Co., 15 So. 3d 501 (Ala. 2009).

West's Key Number Digest, Insurance ⇨2772 to 2816.

Am. Jur. 2d Automobile Insurance §§ 35 to 45, 314 to 347.

**APJI 20.54 UNINSURED MOTORIST—HIT-
AND-RUN/PHANTOM VEHICLE
[PL]**

Plaintiff (name of plaintiff) says (he/she) (had a policy/ was covered by a policy) of insurance with defendant (name of defendant), and the policy has what is commonly called uninsured motorist coverage. This means the policy pays for (name of plaintiff)'s harm cause by an uninsured motorist if the motorist is at fault.

This lawsuit is referred to as a hit-and-run or phantom vehicle case. (Name of plaintiff) says an unknown driver (negligently/wantonly) drove a (car/truck/etc.) and caused (name of plaintiff) harm. By law, an unknown driver is an uninsured motorist; therefore, (name of plaintiff) says (he/ she) can recover under the policy.

(Name of defendant) says (name of plaintiff) cannot recover because (state the reasons and/or affirmative defenses).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of plaintiff) (had an insurance policy/was covered by an insurance policy) in effect with (name of defendant) and the policy had uninsured motorist coverage,
2. The unknown driver (negligently/wantonly) drove a (car/truck/etc.); and,
3. The unknown driver's conduct caused (name of plaintiff)'s harm.

If (name of plaintiff) proved all these things you will find for (him/her) unless (name of defendant) proved an affirmative defense. If (name of defendant) proved an affirmative defense, you must find for it.

If you find for (name of plaintiff), you must then

determine how much money to award (him/her) for the harm caused by the unknown driver.

Approved June 7, 2013

Notes on Use

This instruction combines APJI 20.52 and 20.53 (3d ed. 2012).

References

Motor vehicle accidents caused by unknown owners or operators, more commonly known as hit and run or phantom cases, are uninsured motorist cases. *Wilbourn v. Allstate Ins. Co.*, 305 So. 2d 372, 373–74 (Ala. 1974); *Criterion Ins. Co. v. Anderson*, 347 So. 2d 384, 386 (Ala. 1977). In these cases (as with all uninsured motorist and underinsured motorist cases), “[a]ny policy exclusion that is more restrictive than the uninsured motorist statute . . . is void and unenforceable.” *Peachtree Cas. Ins. Co. v. Sharpton*, 768 So. 2d 368, 370 (Ala. 2000) (quoting *Watts v. Preferred Risk Mut. Ins. Co.*, 423 So. 2d 171, 175 (Ala. 1982)). Unknown phantom drivers are within the definition of an uninsured motorist. *Criterion Ins. Co. v. Anderson*, 347 So. 2d 384, 386 (Ala. 1977).

Walker v. GuideOne Specialty Mut. Ins. Co., 834 So. 2d 769 (Ala. 2002) is a case of first impression. The Court held void the corroborative evidence requirement in the policy that an insurer would only accept competent testimony of a person other than a claimant if the accident involved no physical contact with an uninsured motorist. It overruled *Hannon v. Scottsdale Ins. Co.*, 736 So. 2d 616 (Ala. Civ. App. 1999). The GuideOne court concluded that GuideOne’s corroborative evidence requirement was more restrictive than the language in § 32-7-23 (1975) (2010 Repl. Vol.). This case further extended the holding in *State Farm Fire and Casualty Co. v. Lambert*, 285 So. 2d 917 (Ala. 1973), wherein the Court determined that the physical contact requirement in a hit and run provision of an automobile liability insurance policy was also more restrictive than the statute and, therefore, void against public policy. Note, however, that when the corroborative evidence provision is governed by another jurisdiction’s substantive law, this requirement may be upheld.

Cherokee Ins. Co., Inc., v. Sanches, 975 So. 2d 287 (Ala. 2007).

Franks v. Alfa Mut. Ins. Co., 669 So. 2d 971 (Ala. 1995).

Khirieh v. State Farm Mut. Auto. Ins. Co., 594 So. 2d 1220 (Ala. 1992).

Alfa Mut. Ins. Co. v. Beard, 597 So. 2d 664 (Ala. 1992).

Jones v. Nationwide Mut. Ins. Co., 598 So. 2d 837 (Ala. 1992).

State Farm Fire & Cas. Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917 (1973).

West's Key Number Digest, Insurance ⌘2784.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 4.01 to 4.05 (5th ed. 2010).

Bibb Allen, *Allen's Alabama Liability Insurance Handbook* §§ 21.01 to 21.13 (2d ed. 2008).

Am. Jur. 2d Automobile Insurance §§ 342 to 347.

Walter J. Price, III and Eris Bryan Paul: *More Uninsured/Underinsured Motorist Coverage—An Addition to The Lawyers' Desk Reference*, 74 Ala. Law. 106 (March, 2013).

**APJI 20.55 CASES INVOLVING EITHER A
CROSS-CLAIM OR THIRD PARTY
CLAIM BY THE UNDERINSURED/
UNINSURED MOTORIST CARRIER
AGAINST THE TORTFEASOR [PL]**

The Committee is of the opinion that no cross-claim or third party action should be tried along with the main case. The instructions have been written to conform to the dictates of the Supreme Court of Alabama to withhold from the jury any information about the amount of insurance involved. This is to protect the insurance company or companies against possible prejudice. After appropriate judgments have been entered, the Court can in virtually every case enter an appropriate judgment in favor of the underinsured/uninsured motorist carrier and against the motorist as a matter of law.

Approved July 29, 2013

References

Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165 (Ala. 1991).

Alfa Mut. Ins. Co. v. Moreland, 589 So. 2d 169 (Ala. 1991).

Harvey v. Mitchell, 522 So. 2d 771 (Ala. 1988).

Lowe v. Nationwide Ins. Co., 521 So. 2d 1309 (Ala. 1988).

Barnes v. Tarver, 360 So. 2d 953 (Ala. 1978).

CHAPTER 21 [RESERVED]

Chapter 22

Real Estate Actions [PL]

CAUTION

The Committee originally drafted instructions for cases involving both commercial and residential leases. However, after the Committee approved those instructions, the Alabama Legislature enacted the Alabama Uniform Residential Landlord and Tenant Act (the act), 2006 Ala. Acts 316 (generally effective January 1, 2007). The act concerns landlord-tenant relationships under residential rental agreements. It “does not apply to rental agreements made for commercial, industrial, agricultural or any purpose other than residential.” Ala. Code § 35-9A-101 (1975) (West’s Alabama Code), Ala. cmt. The act is codified in Ala. Code §§ 35-9A-101 to -603.

Among other things, section 3 of the act repealed Ala. Code §§ 35-9-80 to -88, formerly titled Possession Wrongfully Withheld. Those code sections constituted what is commonly known as the Sanderson Act. 1 Jesse P. Evans III, *Alabama Property Rights and Remedies* § 21.4 p. 21-11 (5th ed. 2012).

The legislature amended the act in 2009, 2009 Ala. Acts 633 (effective August 1, 2009), in 2011, 2011 Ala. Acts 700 (effective August 1, 2011), in 2014, 2014 Ala. Acts 279 (effective July 1, 2014); and 2018, 2018 Ala. Acts 473 (effective June 1, 2018).

The Committee has redrafted instructions APJI 22.35C to 22.50D (3rd ed. 2017-2018) in Plain Language, but it has not attempted to contrast or reconcile the redrafted instructions with the act. Consult the law before using these instructions in cases involving residential tenancies.

Approved February 9, 2018

ALABAMA PATTERN JURY INSTRUCTIONS

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

STATUTORY EJECTMENT [PL]

- APJI 22.00A Statutory Ejectment—Introduction [PL]
- APJI 22.01A Statutory Ejectment—Elements and Burden of Proof [PL]
- APJI 22.02A Disclaimer [PL]
- APJI 22.03A Statutory Ejectment—Suggestion of Adverse Possession for Three Years—Ala. Code § 6-6-286 (1975) (West's Alabama Code) [PL]
- APJI 22.04A Statutory Ejectment—Suggestion of Boundary Line Dispute—Ala. Code § 6-6-285 (1975) (West's Alabama Code) [PL]
- APJI 22.05A Statutory Ejectment Action by Mortgagee Against Mortgagor—Ala. Code § 6-6-282 (1975) (West's Alabama Code) [PL]
- APJI 22.06A Statutory Ejectment After Nonjudicial Foreclosure With Affirmative Defenses [PL]
- APJI 22.07A Statutory Ejectment—Action by Tenant in Common Against Cotenant [PL]
- APJI 22.08A Statutory Ejectment—Adverse Possession—Ala. Code § 6-5-200 (1975) (West's Alabama Code) [PL]
- APJI 22.09A Statutory Ejectment—Prescription [PL]
- APJI 22.10A to 22.13A Reserved
- APJI 22.14A Statutory Ejectment—Damages—Generally [PL]
- APJI 22.15A Statutory Ejectment—Damages—Mesne Profits [PL]
- APJI 22.16A Statutory Ejectment—Damages—Permanent Improvements [PL]
- APJI 22.17A Statutory Ejectment—Damages—Waste [PL]
- APJI 22.18A Statutory Ejectment—Damages—Punitive [PL]
- APJI 22.19A Statutory Ejectment—Limitation of Damages for Rents—Possession Under Color of Title [PL]
- APJI 22.20A Statutory Ejectment—Damages—Tenant [PL]
- APJI 22.21A Statutory Ejectment—Damages—Two or More Defendants [PL]
- APJI 22.22A to 22.24A Reserved

REAL ESTATE ACTIONS

QUIET TITLE [PL]

- APJI 22.25B Quiet Title—Elements and Burden of Proof [PL]
- APJI 22.26B Quiet Title—Peaceable Possession—Defined [PL]
- APJI 22.27B Quiet Title—Actual Possession—Defined [PL]
- APJI 22.28B Quiet Title—Constructive Possession—Defined [PL]
- APJI 22.29B Quiet Title—Adverse Possession [PL]
- APJI 22.30B Quiet Title—Prescription—Defined [PL]
- APJI 22.31B Quiet Title—Color of Title—Defined [PL]
- APJI 22.32B Quiet Title—Descent Cast—Defined [PL]
- APJI 22.33B to 22.34B Reserved

FORCIBLE ENTRY AND DETAINER [PL]

- APJI 22.35C Forcible Entry and Detainer—General Instructions [PL]
- APJI 22.36C Forcible Entry—Elements—Ala. Code § 6-6-310 (1) (1975) (West's Alabama Code) [PL]
- APJI 22.37C Peaceable Entry—Elements—Ala. Code § 6-6-310(1) (1975) (West's Alabama Code) [PL]
- APJI 22.38C Unlawful Detainer—Elements—Ala. Code § 6-6-310 (2) (1975) (West's Alabama Code) [PL]
- APJI 22.39C Termination of Possessory Interest or Notice to Quit [PL]
- APJI 22.40C Termination of Possessory Interest—Stipulation [PL]
- APJI 22.41C Termination of Possessory Interest—Expiration of Lease Term [PL]
- APJI 22.42C Termination of Possessory Interest—Tenancy Disavowed [PL]
- APJI 22.43C Termination of Possessory Interest—Express Tenancy at Will—Ten-Day Notice [PL]
- APJI 22.44C Termination of Possessory Interest—Tenancy by the Month—Ten-Day Notice [PL]
- APJI 22.45C Termination of Possessory Interest—Default of Terms of the Lease—Ten-Day Notice [PL]
- APJI 22.46C Damages—Compensatory [PL]
- APJI 22.47C Damages—Detention [PL]
- APJI 22.48C Damages—Double Annual Rent and Special Damages [PL]
- APJI 22.49C Damages—Value of Rent Pending Appeal [PL]
- APJI 22.50C Statute of Limitations [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

APJI 22.51C to 22.54C Reserved

USE AND OCCUPATION [PL]

- APJI 22.55D Use and Occupation [PL]
- APJI 22.56D Demise by Deed or Parol—Ala. Code § 35-9-100(1) (1975) (West’s Alabama Code) [PL]
- APJI 22.57D Defendant Let Into Possession—Ala. Code § 35-9-100(2) (1975) (West’s Alabama Code) [PL]
- APJI 22.58D Tenant at Sufferance—Ala. Code § 35-9-100(3) (1975) (West’s Alabama Code) [PL]
- APJI 22.59D Unlawful Possession—Ala. Code § 35-9-100(4) (1975) (West’s Alabama Code) [PL]
- APJI 22.60D Estoppel—Ala. Code § 35-9-100(5) (1975) (West’s Alabama Code) [PL]
- APJI 22.61D Answer—Defenses [PL]
- APJI 22.62D Damages—General [PL]
- APJI 22.63D Damages—Double Value of Customary Rent [PL]
- APJI 22.64D to 22.66D Reserved

Title of Instruction	Date Approved	Prior Instruction Number
STATUTORY EJECTMENT [PL]		
APJI 22.00A Statutory Ejectment—Introduction [PL]	1/6/17	13.00
APJI 22.01A Statutory Ejectment—Elements and Burden of Proof [PL]	1/6/17	13.01, 13.02
APJI 22.02A Disclaimer [PL]	2/10/17	13.04
APJI 22.03A Statutory Ejectment—Suggestion of Adverse Possession For Three Years—Ala. Code § 6-6-286 (1975) (West’s Alabama Code) [PL]	3/10/17	13.05
APJI 22.04A Statutory Ejectment—Suggestion of Boundary Line Dispute—Ala. Code § 6-6-285 (1975) (West’s Alabama Code) [PL]	4/7/17	13.06
APJI 22.05A Statutory Ejectment—Action By Mortgagee Against Mortgagor—Ala. Code § 6-6-282 (1975) (West’s Alabama Code) [PL]	4/7/17	13.07

REAL ESTATE ACTIONS

Title of Instruction	Date Approved	Prior Instruction Number
APJI 22.06A Statutory Ejectment After Nonjudicial Foreclosure With Affirmative Defenses [PL]	5/5/17	NEW
APJI 22.07A Statutory Ejectment—Action By Tenant In Common Against Cotenant	4/7/17	13.08
APJI 22.08A Statutory Ejectment—Adverse Possession—Ala. Code § 6-5-200 (1975) (West’s Alabama Code) [PL]	4/7/17	13.09
APJI 22.09A Statutory Ejectment—Prescription [PL]	4/7/17	13.10
APJI 22.10A–22.13A Reserved		
APJI 22.14A Statutory Ejectment—Damages—Generally [PL]	2/10/17	13.11
APJI 22.15A Statutory Ejectment—Damages—Mesne Profits [PL]	2/10/17	13.12
APJI 22.16A Statutory Ejectment—Damages—Permanent Improvements [PL]	2/10/17	13.13
APJI 22.17A Statutory Ejectment—Damages—Waste [PL]	3/10/17	13.14
APJI 22.18A Statutory Ejectment—Damages—Punitive [PL]	3/10/17	13.15
APJI 22.19A Statutory Ejectment—Limitation of Damages for Rents—Possession Under Color of Title [PL]	4/7/17	13.17
APJI 22.20A Statutory Ejectment—Damages—Tenant [PL]	3/10/17	13.18
APJI 22.21A Statutory Ejectment—Damages—Two Or More Defendants [PL]	3/10/17	13.19
APJI 22.22A–22.24A Reserved		
QUIET TITLE [PL]		
APJI 22.25B Quiet Title—Elements and Burden of Proof [PL]	1/5/18	36.00–36.02
APJI 22.26B Quiet Title—Peaceable Possession—Defined [PL]	1/5/18	36.03

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Title of Instruction	Date Approved	Prior Instruction Number
APJI 22.27B Quiet Title—Actual Possession—Defined [PL]	1/5/18	36.04
APJI 22.28B Quiet Title—Constructive Possession—Defined [PL]	1/5/18	36.05, 36.06
APJI 22.29B Quiet Title—Adverse Possession [PL]	1/5/18	36.07
APJI 22.30B Quiet Title—Prescription—Defined [PL]	1/5/18	36.08
APJI 22.31B Quiet Title—Color of Title—Defined [PL]	1/22/18	36.09
APJI 22.32B Quiet Title—Descent Cast—Defined [PL]	1/5/18	36.10
APJI 22.33B–22.34B Reserved		
FORCIBLE ENTRY AND DETAINER [PL]		
APJI 22.35C Forcible Entry and Detainer—General Instructions [PL]	2/9/18	New
APJI 22.36C Forcible Entry—Elements—Ala. Code § 6-6-310(1) (1975) (West’s Alabama Code) [PL]	3/9/18	36.22, 36.23
APJI 22.37C Peaceable Entry—Elements—Ala. Code § 6-6-310(1) (1975) (West’s Alabama Code) [PL]	2/9/18	36.24
APJI 22.38C Unlawful Detainer—Elements—Ala. Code § 6-6-310(2) (1975) (West’s Alabama Code) [PL]	2/9/18	36.25
APJI 22.39C Termination of Possessory Interest or Notice To Quit [PL]	3/9/18	36.27
APJI 22.40C Termination of Possessory Interest—Stipulation [PL]	3/9/18	36.28
APJI 22.41C Termination of Possessory Interest—Expiration of Lease Term [PL]	3/9/18	36.29
APJI 22.42C Termination of Possessory Interest—Tenancy Disavowed [PL]	3/9/18	36.30

REAL ESTATE ACTIONS

Title of Instruction	Date Approved	Prior Instruction Number
APJI 22.43C Termination of Possessory Interest—Express Tenancy at Will—Ten-Day Notice [PL]	3/9/18	36.31
APJI 22.44C Termination of Possessory Interest—Tenancy by the Month—Ten-Day Notice [PL]	3/9/18	36.32
APJI 22.45C Termination of Possessory Interest—Default of Terms of the Lease—Ten-Day Notice [PL]	3/9/18	36.33
APJI 22.46C Damages—Compensatory [PL]	3/9/18	36.36
APJI 22.47C Damages—Detention [PL]	3/9/18	36.37
APJI 22.48C Damages—Double Annual Rent and Special Damages [PL]	3/9/18	36.38
APJI 22.49C Damages—Value of Rent Pending Appeal [PL]	3/9/18	36.39
APJI 22.50C Statute of Limitations [PL]	3/9/18	36.35
APJI 22.51C–22.54C Reserved		
USE AND OCCUPATION [PL]		
APJI 22.55D Use and Occupation [PL]	4/6/18	36.70
APJI 22.56D Demise by Deed or Parol—Ala. Code § 35-9-100(1) (1975) (West's Alabama Code) [PL]	4/6/18	36.71
APJI 22.57D Defendant Let Into Possession—Ala. Code § 35-9-100(2) (1975) (West's Alabama Code) [PL]	4/6/18	36.72
APJI 22.58D Tenant at Sufferance—Ala. Code § 35-9-100(3) (1975) (West's Alabama Code) [PL]	4/6/18	36.73
APJI 22.59D Unlawful Possession—Ala. Code § 35-9-100(4) (1975) (West's Alabama Code) [PL]	4/6/18	36.74
APJI 22.60D Estoppel—Ala. Code § 35-9-100(5) (1975) (West's Alabama Code) [PL]	4/6/18	36.75

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Date Approved	Prior Instruction Number
APJI 22.61D Answer—Defenses [PL]	4/6/18	36.76
APJI 22.62D Damages—General [PL]	4/6/18	36.77
APJI 22.63D Damages—Double Value of Customary Rent [PL]	4/6/18	36.78
APJI 22.64D–22.66D Reserved		

STATUTORY EJECTMENT [PL]

APJI 22.00A STATUTORY EJECTMENT— INTRODUCTION [PL]

This is a lawsuit for ejectment.

The purpose of the lawsuit is to recover possession of the land.

A lawsuit for ejectment can also determine whether money damages are owed (name of plaintiff).

Approved Jan. 6, 2017

Notes on Use

Alabama recognizes two actions in ejectment. They are common law ejectment and a statutory action in the nature of ejectment. Ala. Code § 6-6-280 (1975) (West’s Alabama Code).

The instructions in this chapter apply only to a statutory action in the nature of ejectment, § 6-6-280(b). The history and development of the common law action and the statutory action in the nature of ejectment are discussed in MacMillan Bloodell, Inc. v. Ezell, 475 So. 2d 493, 495–96 (Ala. 1985).

References

Alabama State Land Co. v. Matthews, 168 Ala. 200, 53 So.

174 (1910); *Henry v. Thorpe*, 14 Ala. 103, 1848 WL 498 (1848), overruled in part, *Rawls v. Kennedy*, 232 Ala. 240, 1853 WL 246 (1853).

The elements of common-law ejectment are:

1. Claimant's title;
2. Lease, entry and ouster (fictions that must be admitted by the opponent); and
3. Damages (nominal).

Ala. Code § 6-6-280 (1975) (West's Alabama Code).

The elements of statutory ejectment are:

1. Claimant's title;
2. Opponent's unlawful entry and detention; and,
3. Damages (including mesne profits, waste, other injury to the lands, and, if applicable, punitive damages).

See Ala. Code §§ 6-6-280, 6-6-292 to 6-6-296 (1975) (West's Alabama Code).

See Ala. Code §§ 6-5-33(2), 12-11-31, 35-3-1 to 35-3-3 (1975) (West's Ala. Code) (statutory boundary dispute).

Jones v. Regions Bank, 25 So. 3d 427 (Ala. 2009).

Karrh v. Willis, 544 So. 2d 921 (Ala. 1989). Ala. Code § 6-6-284, suggestion of boundary line dispute.

Enterprise Lodge No. 352 of Knights of Pythias, Inc. v. First Baptist Church (Colored) of Evergreen, 288 Ala. 592, 264 So. 2d 153 (1972), appeal after remand, 292 Ala. 579, 298 So. 2d 17 (1974).

Kelley v. Mashburn, 286 Ala. 7, 236 So. 2d 326 (1970).

Morris v. Yancey, 267 Ala. 657, 104 So. 2d 553 (1958).

McCormick v. McCormick, 221 Ala. 606, 130 So. 226 (1930).

Wilson v. State, 115 Ala. 129, 22 So. 567 (1897).

Renasant Bank v. Clark, 203 So. 3d 866 (Ala. Civ. App. 2016).

APJI 22.00A ALABAMA PATTERN JURY INSTRUCTIONS

Bowers v. Bell, 57 So. 3d 130 (Ala. Civ. App. 2010), cert. denied, No. 1091471 (Ala. Sept. 10, 2010).

West's Key Number Digest, Ejectment ☞1 to 35.

Am. Jur. 2d, Ejectment § 1.

**APJI 22.01A STATUTORY EJECTMENT—
ELEMENTS AND BURDEN OF
PROOF [PL]**

The land involved in this lawsuit is (give a brief description of the land).

Plaintiff (name of plaintiff) says (he/she/it) has legal title to the land by (describe how plaintiff says he/she/it has legal title, e.g., by a foreclosure deed dated (date)). (Name of plaintiff) further says defendant (name of defendant) is in possession of the land.

(Name of plaintiff) filed this lawsuit to recover possession of the land (and to recover damages for (describe the damages)).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (he/she/it) had superior legal title to the land when (he/she/it) filed the lawsuit on (date);
2. That (he/she/it) had the right to immediate possession of the land; and,
3. The damages (he/she/it) claims.

If (name of plaintiff) proved all these things you must find for (him/her/it) and award (name of plaintiff) possession of the land, and then you must determine what amount of money to award (name of plaintiff).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved Jan. 6, 2017

Notes on Use

This instruction assumes the defendant denied plaintiff's claim of legal title and admitted possession.

The plaintiff must recover “on the strength of his title or claim to possession and not on the weakness of the defendant’s title.” *MacMillan Bloedell, Inc. v. Ezell*, 475 So. 2d 493, 497 (Ala. 1985).

The plaintiff can recover damages for waste which is the diminished value of the land. The plaintiff can recover mesne profits which are compensation for the use and occupation of the land determined by the fair rental value during the period of the holding. The plaintiff may recover punitive damages, and the plaintiff may recover “for any other injury to the lands, as the plaintiff’s interest in the lands entitled him to recover, . . .” Ala. Code § 6-6-280(b) (1975) (West’s Alabama Code).

APJI 22.03A, Statutory Ejectment—Suggestion of Adverse Possession for Three Years—Ala. Code § 6-6-286 (1975) (West’s Alabama Code) [PL].

APJI 22.15A, Statutory Ejectment—Damages—Mesne Profits [PL].

APJI 22.17A, Statutory Ejectment—Damages—Waste [PL].

APJI 22.18A, Statutory Ejectment—Damages—Punitive Damages [PL].

References

Muller v. Seeds, 919 So. 2d 1174 (Ala. 2005), overruled to the extent it held the plaintiff was required to make a demand for possession before filing an ejectment action, *Steele v. Federal Nat. Mortg. Ass’n*, 69 So. 3d 89, 93 (Ala. 2010).

Atlas Subsidiaries of Fla., Inc. v. Kornegay, 288 Ala. 599, 264 So. 2d 158 (1972).

Jones v. Butler, 286 Ala. 69, 237 So. 2d 460 (1970).

Ex parte Jim Walter Corp., 281 Ala. 670, 207 So. 2d 648 (1968). Before the merger of law and equity, ejectment was a law action and equitable defenses could not be pleaded. Fraud in the inducement was not available as a defense in a law action.

McCary v. Robinson, 272 Ala. 123, 130 So. 2d 25 (1961). There was no remedy by ejectment at law to contest title obtained through conveyance made under undue influence.

Culverhouse v. Glenn, 247 Ala. 622, 25 So. 2d 719 (1946).

Moorer v. Tensaw Land & Timber Co., 246 Ala. 223, 20 So. 2d 105 (1944); *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 So. 670 (1895). Matters cognizable only in a court of equity, such as want of consideration for a mortgage debt, a failure of consideration or usury therein, cannot be set up in defense of an ejectment action by a mortgagee against a mortgagor.

Lomb v. Pioneer Savings & Loan Co., 106 Ala. 591, 17 So. 670 (1895). Historically, a defendant in an ejectment or statutory ejectment action under the plea of not guilty can introduce in evidence any and all facts which operate as a bar to plaintiff's right of possession, whether in denial and disproof of the title relied on by a plaintiff, or in support of the superior and independent right, however acquired, by the defendant.

A suggestion of adverse possession for three years, and a claim of set-off of improvements against rents, must be specially pleaded or claimed.

Disclaimer of possession by the defendant must be filed to part or all the property and issue joined or judgment taken thereon by the plaintiff.

Not guilty and disclaimer are inconsistent defenses and are not allowed under Alabama cases. However, see conflict between Ala. R. Civ. P. Rule 8(e)(2) and the cases. *Smith v. Eudy*, 216 Ala. 113, 112 So. 640 (1927); *Golden v. Rollins*, 259 Ala. 286, 66 So. 2d 91 (1953).

Prescott v. Milne, Ms. 1190397, 2019 WL 6798981 (Ala. Civ. App. Oct. 13, 2019), cert. denied (Ex parte Milne, Ms. 1190397, 2020 WL 2097552 (Ala. May 1, 2020). Under Ala. Code § 40-10-73 (1975) (West's Alabama Code), the holder of a certificate of tax sale must demand possession before he or she can file an action for ejectment. However, the holder of a tax deed does not have to demand possession.

West's Key Number Digest, Ejectment ☞7, 9(2), 26.

West's Key Number Digest, Mortgages and Deeds of Trust ☞213.

West's Key Number Digest, Pleadings ☞115.

Am. Jur. 2d, Ejectment §§ 2, et seq.

APJI 22.02A DISCLAIMER [PL]

The land involved in this lawsuit is (give a brief description of the land).

Plaintiff (name of plaintiff) says (he/she/it) has legal title to the land by (describe how plaintiff says he/she/it has legal title, e.g., by foreclosure deed dated (date)). (Name of plaintiff) further says defendant (name of defendant) is in possession of the land.

(Name of defendant) has filed a disclaimer. (He/she/it) does not dispute (name of plaintiff)'s title, but does deny (he/she/it) is in possession of (some/all) of the land.

(Name of plaintiff) filed this lawsuit to recover possession of the land, costs (, and (describe the damages)).

To recover, (name of plaintiff) must reasonably satisfy you from the evidence:

1. That (name of defendant) was in possession of the land when this lawsuit was filed on (date); and,
2. The damages (name of plaintiff) claims.

If (name of plaintiff) proved all of these things you must find for (him/her/it), and then you must determine the amount of money to award (name of plaintiff).

If (name of plaintiff) did not prove that (name of defendant) was in possession of the land, you must award only possession of the land.

Approved February 10, 2017

Notes on Use

Use this instruction when an answer of disclaimer is filed to all or a part of the land.

The only effect of successfully contesting a disclaimer is to

impose costs and damages upon the unsuccessful disclaimer. *Wade v. Gilmer*, 186 Ala. 524, 64 So. 611 (1914), overruled on other grounds by *Knox v. Criddle*, 529 So. 2d 969 (Ala. 1988). The costs allowed by Ala. Code § 6-6-284 (1975) (West's Alabama Code) do not include attorneys' fees. They must be recovered under a separate statute or contractual provision. *Pepper v. Bentley*, 59 So. 3d 684 (Ala. Civ. App. 2008).

References

Ala. Code § 6-6-284 (1975) (West's Alabama Code).

Ala. Code § 6-6-285 (1975) (West's Alabama Code).

Jones v. Butler, 286 Ala. 69, 237 So. 2d 460 (1970).

Bagley v. Green, 277 Ala. 118, 167 So. 2d 545 (1964).

Cox v. Cook, 245 Ala. 668, 18 So. 2d 406 (1944). Defendant's disclaimer in ejectment action to settle disputed boundary line admits plaintiff's title but denies defendant's possession.

Smith v. Eudy, 216 Ala. 113, 112 So. 640 (1927). In ejectment and statutory actions in nature thereof, not guilty and disclaimer may not be pleaded to the same lands.

Martin v. Howard, 193 Ala. 477, 68 So. 982 (1915). Plaintiff in ejectment held not entitled to judgment for mineral rights under the surface awarded to defendant when the defendant disclaimed the mineral rights.

Wade v. Gilmer, 186 Ala. 524, 64 So. 611 (1914), overruled on other grounds by *Knox v. Criddle*, 529 So. 2d 969 (Ala. 1988). Where defendant disclaimed possession, such plea admitted plaintiff's title but denied defendant's possession and no question of title was litigable.

Wade v. Gilmer, 186 Ala. 524, 64 So. 611 (1914), overruled on other grounds by, *Knox v. Criddle*, 529 So. 2d 969 (Ala. 1988). *Dennis v. Price*, 148 Ala. 243, 41 So. 840 (1906). The only effect of successfully contesting a disclaimer is to impose costs and damages upon the unsuccessful disclaimer. It does not abate the action nor bar the plaintiff's right to recover the land. It simply relates to a personal judgment against the defendant.

Webb v. Reynolds, 139 Ala. 398, 36 So. 15 (1904). When a plea of disclaimer is entered under this section and is not controverted, the plaintiff is liable for cost.

APJI 22.02A**ALABAMA PATTERN JURY INSTRUCTIONS**

Alexander v. Wheeler, 69 Ala. 332, 1881 WL 1153 (1881). In ejectment, a plea of not guilty, or of the statute of limitations, is an admission of possession by the defendant, and under practice, a waiver of a disclaimer also filed by defendant.

Pepper v. Bentley, 59 So. 3d 684 (Ala. Civ. App. 2008).

Coughlin v. Cain, 380 So. 2d 883 (Ala. Civ. App. 1980).

West's Key Number Digest, Ejectment ⇨68, 123, 153.

Am. Jur. 2d, Ejectment § 32.

**APJI 22.03A STATUTORY EJECTMENT—
SUGGESTION OF ADVERSE
POSSESSION FOR THREE
YEARS—ALA. CODE § 6-6-286
(1975) (WEST'S ALABAMA CODE)
[PL]**

If you find for (name of plaintiff), you must then determine whether (name of defendant) adversely possessed the land for over three years.

(Name of defendant) says (he/she/it) has adversely possessed the land since (date). You must decide if this is true or false.

((Name of defendant) says (name the persons or entity through whom defendant claims possession) and (he/she/it) have adversely possessed the land since (date)). You must decide if this is true or false.

((Name of defendant) says (he/she/it) made (a) permanent improvement(s) on the (property/land) (state the improvement(s)). (He/she/it) asks that you compensate (him/her/it) for the value of the improvement(s).)

(Name of defendant) must prove by clear and convincing evidence that (he/she/it) adversely possessed the land for over three years before (name of plaintiff) filed this lawsuit.

If (name of defendant) does not prove adverse possession, you need not determine whether (he/she/it) improved the land. If (name of defendant) proved adverse possession, you must then decide whether (he/she/it) permanently improved the land and the value of the improvement(s).

The three values you must determine from the evidence are:

1. The value of the land without the improvements;
2. The value of the improvements; and,

APJI 22.03A ALABAMA PATTERN JURY INSTRUCTIONS

3. The fair rental value of the land while (name of defendant) adversely possessed it.

I will now instruct you about adverse possession, and then I will instruct you about the law of (a) permanent improvement(s) and how you determine (its/their) value.

Approved March 10, 2017

Notes on Use

Use this instruction in a statutory ejectment action when the defendant has made a suggestion of adverse possession for three (3) years before the date the plaintiff filed the action.

If the defendant proves adverse possession, and proves permanent improvements, the value of the permanent improvements is an off-set against the plaintiff's damages. The parties may agree on a verdict form that allows the trial judge to make the set-off computation. Ala. Code § 6-6-286(b) (1975) (West's Alabama Code).

In addition to set-off, § 6-6-286(b) has other provisions that govern post-trial matters.

The defendant has an equitable right of set-off against mesne profits for permanent improvements the defendant made on the land or to the property. This equitable right is independent of § 6-6-286. *Ex parte Meadows*, 598 So. 2d 908, 911–12 (Ala. 1992); *Manning v. Wingo*, 577 So. 2d 865, 869 (Ala. 1991). Besides proof that the defendant made permanent improvements and the value of the improvements, the defendant must prove he or she is a bona fide occupant under a claim of title. Or, the defendant can prove he or she acted under circumstances of fraud, duress, undue influence, or “mistake of such a character” that equity requires restitution. *Manning* at 869 (quoting *Hewett v. McGaster*, 272 Ala. 498, 133 So. 2d 189 (1961)).

See APJI 22.08A, Statutory Ejectment—Adverse Possession—Ala. Code § 6-5-200 (1975) (West's Alabama Code) [PL].

See APJI 22.16A, Statutory Ejectment—Damages—Permanent Improvements [PL].

References

Ala. Code § 6-6-286 (1975) (West's Alabama Code).

Ex parte Meadows, 598 So. 2d 908, 911–12 (Ala. 1992). Equitable right of set-off.

Manning v. Wingo, 577 So. 2d 865, 869 (Ala. 1991). Equitable right of set-off.

Pelzer Homes, Inc. v. Alabama Power Co., 475 So. 2d 558 (Ala. 1985). The suggestion of adverse possession was made as a counterclaim.

Wells v. Croft, 442 So. 2d 50 (Ala. 1983), appeal after remand, 470 So. 2d 1237 (Ala. Civ. App. 1985). The suggestion of adverse possession was made as a counterclaim.

Hill v. Cape Coral Bank, 402 So. 2d 945 (Ala. 1981). The suggestion of adverse possession under § 6-6-286 is a defense in the nature of a counterclaim.

Franklin v. Wilson, 386 So. 2d 431 (Ala. 1980). The defendant suggested the three year statute in her answer to the complaint.

Sims v. Sims, 273 Ala. 103, 134 So. 2d 757 (1961). When the defendant disclaimed any part of the land sued for, he cut himself off from proof of adverse possession of such disclaimed land.

Moore v. McLean, 248 Ala. 9, 26 So. 2d 96 (1946).

Headley v. McCall, 205 Ala. 108, 87 So. 355 (1920). Singleton v. Jackson, 177 Ala. 123, 59 So. 45 (1912). If the defendant wants to set-off for improvements, he or she must make a suggestion under § 6-6-286 or under common law. Otherwise, the defendant cannot obtain a set-off.

Newsom v. Guy, 109 Ala. 305, 19 So. 448 (1896). The suggestion of adverse possession is not repugnant to a plea of not guilty.

Headley v. McCall, 205 Ala. 108, 87 So. 355 (1920). A suggestion as allowed by Ala. Code § 6-6-286 (1975) (West's Alabama Code) does not deprive the defendant of the common-law right of set-off of the value of permanent improvements against the rents.

West's Key Number Digest, Ejectment ⇨9(2), 9(3), 10, 142(2), 142(3), 142(4), 143, 146.

West's Key Number Digest, Improvements ⇨4(1).

West's Key Number Digest, Vendor and Purchaser ⇨229(1).

Am. Jur. 2d, Ejectment § 11.

**APJI 22.04A STATUTORY EJECTMENT—
SUGGESTION OF BOUNDARY
LINE DISPUTE—ALA. CODE § 6-6-
285 (1975) (WEST’S ALABAMA
CODE) [PL]**

(Name of defendant) says this lawsuit is about a disputed boundary line. (He/she/it) says the true boundary line is (state the defendant’s description).

(Name of plaintiff) disagrees, and (he/she/it) says the true line is (state the plaintiff’s description).

You must determine from the evidence the true boundary line, and then you must write the true boundary line description in the verdict form.

Approved April 7, 2017

Notes on Use

It is imperative that the user review Ala. Code § 6-6-285 (1975) (West’s Alabama Code) and the case law when a party suggests a boundary line dispute.

Although color of title is an indispensable element in some cases under § 6-5-200, it has no application to cases about a boundary between coterminous landowners.

If the jury’s verdict merely makes reference to a named survey the verdict may be technically incomplete. But, the verdict may be amended or supplemented by the trial court in its judgment and the trial court may fix the true line by metes and bounds descriptions or reference to the permanent monuments described in the survey. *Knox v. Criddle*, 529 So. 2d 969, 972–73 (Ala. 1988). *Knox* overruled *Wade v. Gilmer*, 186 Ala. 524, 64 So. 611 (1914) and *Ward v. Lane*, 189 Ala. 340, 66 So. 499 (1914) to the extent they were inconsistent with *Knox*.

The statutes that regulate taxing costs apply, and the provision in § 6-6-285 that “the costs shall be apportioned justly and equitably” relates “to the costs and expense of ‘establishing and mark-

ing out the line by the sheriff.’” *Pounders v. Nix*, 222 Ala. 27, 29, 130 So. 537, 539 (1930) (quoting *Oliver v. Oliver*, 187 Ala. 340, 346, 65 So. 373, 375–76 (1914)).

References

Ala. Code §§ 6-6-284, 6-6-285 (1975) (West’s Alabama Code).

Ala. Code §§ 35-3-1 to 35-3-3, 35-4-360 (1975) (West’s Alabama Code).

Knox v. Criddle, 529 So. 2d 969, 972–73 (Ala. 1988).

Simon v. Snyder, 279 Ala. 70, 181 So. 2d 885 (1966).

Ray v. Fowler, 265 Ala. 65, 89 So. 2d 573 (1956).

Golden v. Rollins, 259 Ala. 286, 66 So. 2d 91 (1953).

Cox v. Cook, 245 Ala. 668, 18 So. 2d 406 (1944).

Hancock v. Warren, 235 Ala. 180, 177 So. 907 (1937). In ejectment to settle disputed boundary line, the defendant must describe in his suggestion the location of true line for such suggestion to be sufficient.

Pounders v. Nix, 222 Ala. 27, 29, 130 So. 537, 539 (1930).

Oliver v. Oliver, 187 Ala. 340, 65 So. 373 (1914).

West’s Key Number Digest, Boundaries ☞32, 38, 42, 45.

West’s Key Number Digest, Ejectment ☞11, 75, 111(3), 114.

2 Ally Windsor Howell, *Alabama Personal Injury & Torts* § 10:8 (2016 ed.).

2 Tiffany Real Property § 652 (3rd ed. Sept, 2016).

Am. Jur. 2d, Ejectment § 38.

**APJI 22.05A STATUTORY EJECTMENT
ACTION BY MORTGAGEE
AGAINST MORTGAGOR—ALA.
CODE § 6-6-282 (1975) (WEST’S
ALABAMA CODE) [PL]**

(Name of defendant) mortgaged (his/her/its) land (describe the land) to (name of plaintiff). (Name of defendant) gave the mortgage to secure the repayment of a loan for (state the amount) (name of plaintiff) made to (name of defendant) on (date).

(Name of plaintiff) says (name of defendant) has (failed to repay the loan as required) (failed to perform a condition of the mortgage (state the condition)). As a result of (name of defendant)’s failure, (name of plaintiff) filed this lawsuit to recover possession of the property.

(Name of defendant) says:

((He/she/it) does not owe any money because (state the reason(s)).)

((He/she/it) performed the condition of the mortgage.)

((He/she/it) does not owe the amount of money (name of plaintiff) says (name of defendant) owes.)

(Name of plaintiff) must reasonably satisfy you from the evidence:

(That (name of defendant) has not paid the loan as required.)

(That (name of defendant) failed to perform (state the condition of the mortgage).)

If you find that (name of defendant) (has not paid the loan as required) (failed to perform the condition of the mortgage), you must find for (name of plaintiff) for posses-

sion of the land. You must further determine the amount of money (name of defendant) owes (name of plaintiff).

If you find that (name of defendant) (paid the loan as required) (did not fail to perform a condition of the mortgage), you must find for (name of defendant).

Approved April 7, 2017

Notes on Use

Ala. Code § 6-6-282 (1975) (West's Alabama Code) is inoperative after foreclosure.

The instruction assumes an action by the original mortgagee against the mortgagor. If the note and/or mortgage have been assigned, the user must modify the instruction.

References

It is only the existence or amount of the mortgage debt which can be put in issue under Ala. Code § 6-6-282 (1975) (West's Alabama Code), and its existence can be disproved or its amount reduced only by evidence of payment in whole or pro tanto.

The last clause in Ala. Code § 6-6-282 (1975) (West's Alabama Code) may be proved on plea of not guilty.

Moore v. McLean, 248 Ala. 9, 26 So. 2d 96 (1946). Moorer v. Tensaw Land & Timber Co., 246 Ala. 223, 20 So. 2d 105 (1944). Sanders v. Cassady, 86 Ala. 246, 5 So. 503 (1889). The establishment of the right to redeem mortgaged land exists independently of this section. It merely provides an additional remedy to enforce an existing right or to settle an existing controversy.

Moorer v. Tensaw Land & Timber Co., 246 Ala. 223, 20 So. 2d 105 (1944). Defenses to mortgage debt other than payment thereof, such as usury, set-off, want or failure of consideration may not be proved on plea of not guilty in a mortgagee's ejectment action against mortgagor.

Pridgen v. Elson, 242 Ala. 230, 5 So. 2d 477 (1941). The statute of limitations cannot be raised.

Ramsey v. Sibert, 192 Ala. 176, 68 So. 349 (1915). Jackson v.

APJI 22.05A**ALABAMA PATTERN JURY INSTRUCTIONS**

Tribble, 156 Ala. 480, 47 So. 310 (1908). *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 17 So. 670 (1895). In an action of statutory ejectment to recover mortgaged land, the defendant may plead payment under this section and also “not guilty”.

West’s Key Number Digest, Mortgages and Deeds of Trust
☞213, 298, 299.

Am. Jur. 2d, Mortgages §§ 159 to 161, 305 to 344, 471 to 687.

**APJI 22.06A STATUTORY EJECTMENT AFTER
NONJUDICIAL FORECLOSURE
WITH AFFIRMATIVE DEFENSES
[PL]**

(Name of defendant) mortgaged (his/her/its) land (describe the land) to (name of plaintiff). (Name of defendant) gave the mortgage to secure the repayment of the loan for (state the amount) (name of plaintiff) made to (name of defendant) on (date).

(Name of plaintiff) says (name of defendant) (did not repay the loan as required) (failed to perform a condition of the mortgage (state the condition)). (Name of plaintiff) says (he/she/it) properly foreclosed on the mortgage, bought the land at the foreclosure sale, and got a deed to the land.

(Name of plaintiff) says (he/she/it) is entitled to possession of the land but (name of defendant) refused to give up possession. (Name of plaintiff) filed this lawsuit to eject (name of defendant) from the land.

(Affirmative defenses.)

(Name of defendant) admits (name of person or entity) foreclosed the property, but says (name of plaintiff) should not recover possession of the land because the foreclosure was void.

(Name of defendant) says the foreclosure was void because:

((Name of person or entity that foreclosed the mortgage) did not have the legal right to exercise the power of sale.)

(The debt secured by the mortgage was fully paid before the foreclosure.)

((Name of person or entity that foreclosed the mortgage) failed to give notice of the time and place of the foreclosure sale.)

(The price (name of person or entity) paid for the property at the foreclosure sale was so inadequate that it shocks the conscience.)

((Name of person or entity that foreclosed the mortgage) sold the property en masse instead of in parcels. The sale harmed (name of defendant) and violated (name of mortgagee's) duty of fairness and good faith when (he/she/it) exercised the power of sale.)

State how (name of defendant) says the en masse foreclosure harmed (him/her/it).

If (name of defendant) proves any of the defenses, you will find for (him/her/it).

Approved May 5, 2017

Notes on Use

Use this instruction with APJI 22.00A and 22.01A. If the defendant does not raise any affirmative defenses, use the first three paragraphs of the instruction as an introduction to the ejectment action.

This is a bare bones instruction and assumes the action is between the original mortgagor and mortgagee.

The instruction does address any counterclaim the defendant may file.

Do not use this instruction when the former mortgagor files a direct action to avoid the foreclosure.

References

The references are to the more recent Alabama cases. The user may wish to consult earlier case law.

Ex parte Turner, 254 So. 3d 207 (Ala. 2017).

Ex parte GMAC Mortg., LLC, 176 So. 3d 845 (Ala. 2013).

Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013).

See *Muller v. Seeds*, 975 So. 2d 914 (Ala. 2007) (foreclosure en masse under discretionary power granted in mortgage).

Tidmore v. Citizens Bank & Trust, 250 So. 3d 577 (Ala. Civ. App. 2017) (foreclosure en masse).

Pittman v. Regions Bank, 226 So. 3d 193 (Ala. Civ. App. 2016).

Williams v. Wells Fargo Bank, N.A., 218 So. 3d 816 (Ala. Civ. App. 2016).

Smalls v. Wells Fargo Bank, N.A., 180 So. 3d 910 (Ala. Civ. App. 2015).

Gray v. Federal Nat'l Mortg. Ass'n, 143 So. 3d 825 (Ala. Civ. App. 2014).

Campbell v. Bank of America, N.A., 141 So. 3d 492 (Ala. Civ. App. 2012), cert. denied, No. 1111284 (Ala. Sept. 13, 2013).

Douglas v. Troy Bank & Trust Co., 122 So. 3d 181 (Ala. Civ. App. 2012), reh'g denied (Ala. Civ. App. Jan. 4, 2013), cert. denied, No. 1120435 (Ala. Mar. 15, 2013).

Thomas v. Wells Fargo Bank, N.A., 116 So. 3d 226 (Ala. Civ. App. 2012), reh'g denied (Ala. Civ. App. Oct. 26, 2012), cert. denied, No. 1120197 (Ala. Jan. 4, 2013).

Berry v. Deutsche Bank Nat'l Trust Co., 57 So. 3d 142 (Ala. Civ. App. 2010).

Synovus Bank v. Summerford, No. 2:12-CV-3598-VEH, 2014 WL 6607944 (N.D. Ala. Nov. 20, 2014), appeal dismissed, No. 14-15663 (11th Cir. Mar. 16, 2015).

West's Key Number Digest, Bills and Notes ◊150, 150(1).

West's Key Number Digest, Mortgages and Deeds of Trust ◊1645, 1742, 1748, 1749.

Ala. Code § 6-5-251 (1975) (West's Alabama Code).

Ala. Code §§ 7-1-201 (b)(21)(A), 7-3-104, 7-3-301 (1975) (West's Alabama Code).

Ala. Code §§ 35-10-1 to 35-10-10 (1975) (West's Alabama Code).

Ally Windsor Howell, *Tilley's Alabama Equity* § 15:2 (5th ed. Apr. 2017).

APJI 22.06A ALABAMA PATTERN JURY INSTRUCTIONS

Am. Jur. 2d, Mortgages §§ 159 to 161, 305 to 344, 471 to 687.

**APJI 22.07A STATUTORY EJECTMENT—
ACTION BY TENANT IN COMMON
AGAINST COTENANT [PL]**

(Name of plaintiff) and (name of defendant) are tenants in common. This means they have equal right to the use and enjoyment of the (land/property). The possession of the cotenant is presumed to be friendly to and for the common benefit of (his/her/its) cotenant.

(Name of plaintiff) says (name of defendant) ousted (name of plaintiff) from possession of the land. Ouster is notice by (name of defendant) to (name of plaintiff) that (name of defendant) intends to deny (name of plaintiff)'s rights as a cotenant.

To recover (name of plaintiff) must prove to your reasonable satisfaction from the evidence that (name of defendant) ousted (name of plaintiff).

Ouster can be by words or conduct. But, (name of plaintiff) must prove some clear and definite act by (name of defendant) that shows (his/her/its) possession is no longer a common possession friendly to and for the common benefit of (name of plaintiff) and (name of defendant).

You will consider all the evidence in this case to determine if (name of plaintiff) proved acts of a clear and definite character that show ouster.

(A refusal by a tenant in common in possession to allow joint use and enjoyment upon demand by his co-tenant, furnishes clear evidence of ouster.)

(If you find for (name of plaintiff), you must determine what amount of money will fairly and reasonably compensate (him/her/it) for the harm. (Name of plaintiff) must reasonably satisfy you from the evidence that (name of defendant)'s conduct caused (name of plaintiff)'s harm.)

APJI 22.07A ALABAMA PATTERN JURY INSTRUCTIONS

Approved April 7, 2017

Notes on Use

Use this instruction when the action is by a tenant in common against his cotenant in possession unless the defense interposed repudiates the existence of a cotenancy. Such repudiation is sufficient evidence of an ouster.

APJI 22.14A, Damages—Generally.

APJI 22.15A, Damages—Mesne Profits.

APJI 22.16A, Damages—Permanent Improvements.

APJI 22.17A, Damages—Waste.

APJI 22.18A, Damages—Punitive.

References

Ex parte Walker, 739 So. 2d 3 (Ala. 1999).

See *Horne v. Ward*, 585 So. 2d 877 (Ala. 1991) (adverse possession as it relates to cotenants).

Knouff v. Knouff, 485 So. 2d 1155 (Ala. 1986).

See *Jones v. Jones*, 423 So. 2d 158 (Ala. 1982) (action for sale for division and defense of adverse possession).

Spiller v. Mackereth, 334 So. 2d 859 (Ala. 1976).

Judd v. Dowdell, 244 Ala. 230, 12 So. 2d 858 (1943).

Farr v. Perkins, 173 Ala. 500, 55 So. 923 (1911).

Hamby v. Folsam, 148 Ala. 221, 42 So. 548 (1906).

Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 So. 760 (1890).

Philpot v. Bingham, 55 Ala. 435, 1876 WL 1173 (1876).

See *Bohanon v. Edwards*, 970 So. 2d 777 (Ala. Civ. App. 2007) (action to quiet title and defense of adverse possession).

West's Key Number Digest, Tenancy in Common ◊38, 38(3).

REAL ESTATE ACTIONS

APJI 22.07A

West's Key Number Digest, Adverse Possession ⌘25, 25(2).

Am. Jur. 2d, Adverse Possession §§ 190 to 212.

**APJI 22.08A STATUTORY EJECTMENT—
ADVERSE POSSESSION—ALA.
CODE § 6-5-200 (1975) (WEST'S
ALABAMA CODE) [PL]**

(Name of defendant) says (he/she/it) has adversely possessed the land since (date).

Under certain circumstances, a person can get valid title to land through adverse possession. Adverse possession means that person adversely possessed it against all other people.

The adverse possessor must first satisfy a requirement under an Alabama statute, and then the person must adversely possess the land for ten years. Before you can find that (name of defendant) adversely possessed the land, (name of defendant) must prove (his/her/its) adverse possession by clear and convincing evidence.

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim of adverse possession and a high probability that your conclusion is correct.

(Name of defendant) must first satisfy the Alabama statute. (He/she/it) must prove one of these three things:

1. That a deed or other color of title that seemed to transmit title to (him/her/it) has been properly recorded in the office of the Judge of Probate of (name the county) for ten years before (name of plaintiff) filed this lawsuit; or,

2. That (name of defendant), and those through whom (he/she/it) claims, annually listed the land for taxation in (name the county) for ten years before (name of plaintiff) filed this lawsuit; or

3. That (name of defendant) gets title by descent cast, or devise from a predecessor in the title who was in possession of the land.

(Tacking.)

If the period during which (name of defendant)'s deed or color of title has been on record, added to the time during which the deeds or color of title of those through whom (he/she/it) claims have been on record is ten years, this satisfies the ten year requirement if they were adversely possessing the land.

(Color of title.)

Color of title is an instrument or writing which claims to transfer title or a right of possession, but in reality, does not.

(Listing for taxation.)

In some circumstances, the failure to annually list the land for taxation during the ten year period does not bar a (claim/defense) of adverse possession if (name of defendant) meets all the other requirements of adverse possession. These circumstances are:

1. If (name of defendant) or those through whom (he/she/it) claims carelessly failed to annually list the land for taxation; or

2. If (name of defendant) or those through (he/she/it) claims made an unintentional mistake in the description of the assessment; or

3. There is an unintentional omission of any part of the property description from the assessment.

(Name of defendant) must prove by clear and convincing evidence that (state the circumstance that applies).

(Descent cast.)

Descent cast is a technical term that applies when a person without color of title dies in possession of land. If (his/her) heirs continue to possess the land, the law is their possession is under color of title.

If (name of defendant) met one of the statutory requirements, you must then determine if (he/she/it) adversely possessed the land. If (name of defendant) did not satisfy one of these statutory requirements, you must find that (he/she/it) did not adversely possess the land.

Elements.

(Name of defendant) must clearly convince you from the evidence:

1. That (his/her/its) possession was hostile to all others including the true owner;

2. That (his/her/its) possession was actual. This means an actual occupancy or some act such as residence, cultivation, cutting timber, and like activities on the land for which it is reasonably suited;

3. That (his/her/its) possession was open and notorious. This means it was such that the person to be barred from possession either knew or may be presumed to know of (name of defendant)'s possession;

4. That (his/her/its) possession was exclusive. This means (he/she/it) claimed the land to the exclusion of all others;

The terms open, notorious, and exclusive mean such acts the true owner would ordinarily perform appropriating the land to (his/her/its) own use and in preventing others from its use so far as it was reasonable for (name of defendant) to do so; and

5. That (name of defendant)'s possession was continuous for ten years. This means continually or consecutive.

These elements must combine to be adverse possession. In deciding whether (name of defendant) proved all these things, you will consider the nature, character, location, and common use the land could be put to.

If (name of defendant) proved all these things, you must find (he/she/it) has valid title to the land and is entitled to its possession. You must also find against (name of plaintiff).

If (name of defendant) did not prove all these things, you must find for (name of plaintiff) on (name of defendant)'s claim of adverse possession.

Approved April 7, 2017

Notes on Use

References

Ala. Code § 6-5-200 (1975) (West's Alabama Code).

Ex parte Walker, 739 So. 2d 3 (Ala. 1999).

Horne v. Ward, 585 So. 2d 877 (Ala. 1991).

Sparks v. Byrd, 562 So. 2d 211 (Ala. 1990).

Knouff v. Knouff, 485 So. 2d 1155 (Ala. 1986).

Long v. Ladd, 273 Ala. 410, 142 So. 2d 660 (1962).

Tate v. Water Works and Sewer Bd. of City of Oxford, 217 So. 3d 906 (Ala. Civ. App. 2016).

Henderson v. Dunn, 871 So. 2d 807 (Ala. Civ. App. 2001).

West's Key Number Digest, Adverse Possession ☞1 et seq.

Am. Jur. 2d, Adverse Possession § 1 et seq.

**APJI 22.09A STATUTORY EJECTMENT—
PRESCRIPTION [PL]**

(Name of defendant) says (he/she/it) has title to the land by what is called prescription.

If a person takes possession of land for twenty years and meets the other requirements of prescription, the possession ripens into title.

(Name of defendant) must prove prescription by clear and convincing evidence.

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim of prescription and a high probability that your conclusion is correct.

(Name of defendant) must clearly convince you from the evidence:

1. That (his/her/its) possession was hostile to all others including the true owner;

2. That (his/her/its) possession was actual. This means an actual occupancy or some act such as residence, cultivation, cutting timber, and like activities on the land for which it is reasonably suited;

3. That (his/her/its) possession was open and notorious. This means it was such that the person to be barred from possession either knew or may be presumed to know of (name of defendant)'s possession;

4. That (his/her/its) possession was exclusive. This means (he/she/it) claimed the land to the exclusion of all others;

The terms open, notorious, and exclusive mean such acts the true owner would ordinarily perform appropriating

the land to (his/her/its) own use and in preventing others from its use so far as it was reasonable for (name of defendant) to do so; and

5. (Name of defendant)'s possession was continuous for twenty years. This means continually or consecutive.

You must consider all these things together, not independently. These elements must combine to be prescription. In deciding whether (name of defendant) proved all these things, you will consider the nature, character, location, and common use the land could be put to.

If (name of defendant) proved all these things, you must find (he/she/it) has valid title to the land and is entitled to its possession. You must also find against (name of plaintiff).

If (name of defendant) did not prove all these things, you must find for (name of plaintiff) on (name of defendant)'s claim of prescription.

Approved April 7, 2017

Notes on Use

Use this instruction when the action is to confer or defeat title to property on a complaint, counter-claim, cross-claim, or as a defense to an action in ejectment.

The rule of prescription is a rule of absolute repose.

References

Hinote v. Owens, 248 So. 3d 964 (Ala. 2017).

Snow v. Boykin, 432 So. 2d 1210 (Ala. 1983).

Cloud v. Southmont Development Co., 287 Ala. 544, 253 So. 2d 298 (1971).

Fitts v. Alexander, 277 Ala. 372, 170 So. 2d 808 (1965).

Lay v. Phillips, 276 Ala. 273, 161 So. 2d 477 (1964).

APJI 22.09A**ALABAMA PATTERN JURY INSTRUCTIONS**

Barry v. Thomas, 273 Ala. 527, 142 So. 2d 918 (1962).

Orso v. Cater, 272 Ala. 657, 133 So. 2d 864 (1961).

Bradley v. Hall, 239 Ala. 544, 195 So. 883 (1940).

Kidd v. Browne, 200 Ala. 299, 76 So. 65 (1917).

West's Key Number Digest, Adverse Possession ☞13.

Am. Jur. 2d, Adverse Possession § 8.

APJI 22.10A to 22.13A**Reserved**

**APJI 22.14A STATUTORY EJECTMENT—
DAMAGES—GENERALLY [PL]**

(Name of plaintiff) seeks damages for:

(The fair rental value of the (property/land) during the time (name of defendant) occupied and used it.)

(Damages for waste.)

(Specify any other damages the plaintiff claims for harm to the (land/property).)

(Punitive damages.)

Approved February 10, 2017

Notes on Use

Do not use this instruction when the sole issue is:

1. The liability of a tenant under a lease.
2. The liability of a person holding under color of title in good faith. *Scott v. Coulson*, 156 Ala. 450, 47 So. 60 (1908).
3. Or, when the action is by a mortgagee against a mortgagor.

References

Ala. Code § 6-6-280 (1975) (West's Alabama Code).

Ala. Code § 6-6-282 (1975) (West's Alabama Code).

Ala. Code § 6-6-288 (1975) (West's Alabama Code).

Ala. Code § 6-6-289 (1975) (West's Alabama Code).

Pridgen v. Elson, 242 Ala. 230, 5 So. 2d 477 (1941).

Fuller v. Fair, 202 Ala. 430, 80 So. 814 (1919).

Scott v. Coulson, 156 Ala. 450, 47 So. 60 (1908).

APJI 22.14A ALABAMA PATTERN JURY INSTRUCTIONS

West's Key Number Digest, Ejectment ☞127.

Am. Jur. 2d, Ejectment §§ 49 to 53.

**APJI 22.15A STATUTORY EJECTMENT—
DAMAGES—MESNE PROFITS [PL]**

(Name of plaintiff) seeks damages from (name of defendant) for the time (he/she/it) wrongfully occupied and used the (property/land). (Name of plaintiff) says (name of defendant) occupied and used the property starting on (date).

If you find for (name of plaintiff), you can award (him/her/it) money compensation for the fair rental value of the (property/land).

The fair rental value is based on the condition of the (property/land) when (name of defendant) first wrongfully held the (property/land). And, the fair rental value is measured from the time (name of defendant) first wrongfully held the (property/land) to the time of your verdict.

(Name of plaintiff) must reasonably satisfy you from the evidence what the fair rental value is.

Approved February 10, 2017

Notes on Use

Use this instruction to explain mesne profits which are “compensation for [the] defendant’s use and occupation—meaning damages from the commencement of the tortious withholding to the time of the verdict.” *Scott v. Coulson*, 156 Ala. 450, 453, 47 So. 60, 61 (1908).

The fair rental value of property is the reasonable rental value and not necessarily the rents the defendant received. Cf. *Kellis v. Estate of Schnatz*, 17 So. 3d 676 (Ala. Civ. App. 2009) (rescission of real property sales contract and balancing the equities to return the parties to status quo).

References

Ala. Code § 6-6-280(b) (1975) (West’s Alabama Code).

Ex parte Meadows, 598 So. 2d 908 (Ala. 1992).

APJI 22.15A**ALABAMA PATTERN JURY INSTRUCTIONS**

Pridgen v. Elson, 242 Ala. 230, 5 So. 2d 477 (1941). If, pending suit to recover land in an ejectment action the plaintiff's title expires, he may recover the mesne profits up to the time his right to possession ended.

Federal Land Bank of New Orleans v. Farris, 226 Ala. 574, 148 So. 123 (1933).

Profile Cotton Mills v. Calhoun Water Co., 204 Ala. 243, 85 So. 284 (1920).

Fuller v. Fair, 202 Ala. 430, 80 So. 814 (1919).

Scott v. Coulson, 156 Ala. 450, 47 So. 60 (1908).

Miller v. Parvin, 450 So. 2d 146 (Ala. Civ. App. 1984).

West's Key Number Digest, Ejectment ☞125, 127, 128, 132.

Jenelle Mims Marsh, Alabama Law of Damages § 34:7 (6th ed. 2012).

2 Ally Windsor Howell, Alabama Personal Injury & Torts § 10:18 (2016 ed.).

Am. Jur. 2d, Ejectment §§ 49, 50.

**APJI 22.16A STATUTORY EJECTMENT—
DAMAGES—PERMANENT
IMPROVEMENTS [PL]**

An improvement is anything that increases the value of the property involved.

A permanent improvement does not necessarily last forever; it is something that rests on or is attached to the soil, is reasonably enduring, and is not intended to be removed.

(Repairs are permanent improvements if they are permanent and increase the value of the property.)

(Name of defendant) must prove to your reasonable satisfaction from the evidence that:

1. (He/she/it) made permanent improvements to the (property/land); and if so,
2. The value of the permanent improvements.

The value of the permanent improvements, if made, is the difference between the value of the land before (name of defendant) made them and the value of the land after (he/she/it) made the permanent improvements.

You must determine the value of the permanent improvements.

Approved February 10, 2017

Notes on Use

The instruction is based on *Smith v. Sulzby*, 205 Ala. 301, 302, 87 So. 823, 824 (1921). Another definition of “permanent improvement” is stated in *E.B. Inv., L.L.C. v. Pavilion Dev., L.L.C.*, 212 So. 3d 149, 167 (Ala. 2016). The terms are very broad. *Smith* at 302.

Under § 6-6-286(b), if the value of the permanent improvements exceeds the value of the lands use and occupation, the

plaintiff cannot get a writ of possession for one year unless the plaintiff pays the defendant the excess of the value of improvements over the value of the land's use and occupation. The code section makes no mention the defendant is limited to rent that accrued only the year before the plaintiff files suit. See § 6-6-289 and APJI 22.19A. However, *Cade v. Graffo*, 227 Ala. 11, 148 So. 591 (1933) held when the defendant adversely possessed the land under color of title and in good faith, the plaintiff must pay the defendant the excess of the value of improvements over rents less the value of the year's rent before the plaintiff filed suit. *Cade* appears to remain good law.

References

Ala. Code § 6-6-286 (1975) (West's Alabama Code).

Manning v. Wingo, 577 So. 2d 865 (Ala. 1991). A purchaser who had constructive knowledge that the deed was void but who acts in good faith and under a belief, induced by fraud, duress, undue influence, or mistake, that he owns the property, is entitled to restitution.

Sims v. Sims, 273 Ala. 103, 134 So. 2d 757 (1961). *Murray v. Barnes*, 146 Ala. 688, 40 So. 348 (1906). *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448, 7 So. 760 (1890). One who has knowledge of an adverse claim is not entitled to the right to set-off improvements made after acquiring such knowledge.

Smith v. Sulzby, 205 Ala. 301, 87 So. 823 (1921). The term improvement is so broad to include repairs and almost every form of expenditure, either capital or labor, if they enhance the value of the property.

Mink v. Whitfield, 218 Ala. 334, 118 So. 559 (1928). *Smith v. Sulzby*, 205 Ala. 301, 87 So. 823 (1921). *Donehoo v. Johnson*, 113 Ala. 126, 21 So. 70 (1896). *Headley v. McCall*, 205 Ala. 108, 87 So. 355 (1920). A general judgment for the plaintiff necessarily carried a denial of defendant's right to have the benefit of the value of the improvements.

Kerret v. Nicholas, 88 Ala. 346, 6 So. 698 (1889). A defendant has the common-law right to set-off the value of permanent improvements against the rents, even though he has suggested adverse possession for three years.

West's Key Number Digest, Ejectment ☞139 to 151.

West's Key Number Digest, Improvements ☞4.

REAL ESTATE ACTIONS

APJI 22.16A

Am. Jur. 2d, Ejectment §§ 52, 53.

Am. Jur. 2d, Improvements §§ 1, et seq.

**APJI 22.17A STATUTORY EJECTMENT—
DAMAGES—WASTE [PL]**

(Name of plaintiff) says (name of defendant) harmed the (property/land) while (he/she/they/it) possessed it. (Name of plaintiff) says the harm was (describe the defendant's conduct and the harm, e.g., cut timber off the land), and (he/she/it) seeks damages for the harm.

The technical term for the harm is waste. Waste is any destruction (name of defendant) caused or allowed to occur while (he/she/they/it) possessed the land.

(Name of plaintiff) must reasonably satisfy you from the evidence that:

(Name of defendant) committed waste while (he/she/they/it) possessed the land.

If (he/she/they/it) did commit waste, then you must determine the amount of money to award (name of plaintiff).

(Timber cut from land.)

The measure of damages for cutting timber is the difference between the reasonable market value of the land immediately before the timber was cut and the reasonable market value of the land immediately after it was cut.

(Land totally destroyed.)

If the land's value is totally destroyed, (name of plaintiff) can recover the reasonable market value of the land at the time of the destruction.

(Land permanently harmed but not totally destroyed.)

If the land is permanently harmed but not totally destroyed, (name of plaintiff) can recover the difference between the reasonable market value of the land at the time immediately before the harm and its reasonable market value in its condition immediately after the harm.

(Land temporarily harmed.)

If the land is temporarily but not permanently harmed, (name of plaintiff) may recover its fair rental value plus the amount reasonably necessary to repair the harm or to put the land in the condition it was at the time immediately before the harm.

The fair rental value plus the reasonable cost of repair cannot be more than the difference between the reasonable market value of the land immediately before the harm and its reasonable market value in its condition immediately after the harm.

Approved March 10, 2017

Notes on Use

Use this instruction when the defendant was in actual possession.

Fuller v. Fair, 202 Ala. 430, 80 So. 814 (1919) states the plaintiff can recover interest at the legal rate on damage in the second, third, and fourth categories in the instruction. Although damages for waste are computed up to verdict, Fuller states interest can be recovered only to the time of trial. Although Fuller appears to remain good law, the Committee does not propose an instruction on interest, and the user may wish to consult Jenelle Mims Marsh, Alabama Law of Damages §§ 8:4 and 34:7 (6th ed. 2012), other treatises, and Alabama case law to determine whether a plaintiff can recover interest.

The Committee rewrote the instruction on the measure of damages that applies to temporary harm. The rewritten instruction is necessitated by the holding in Poffenbarger v. Merit Energy Co., 972 So. 2d 792, 779 n. 8 (Ala. 2007).

References

Ala. Code § 6-6-280 (1975) (West's Alabama Code).

Poffenbarger v. Merit Energy Co., 972 So. 2d 792 (Ala. 2007).

Westmoreland v. Birmingham Trust & Savings Bank, 214 Ala. 593, 108 So. 536 (1926).

APJI 22.17A ALABAMA PATTERN JURY INSTRUCTIONS

Fuller v. Fair, 202 Ala. 430, 80 So. 814 (1919).

Cf. Lyons v. Stickney, 170 Ala. 134, 54 So. 496 (1911) (subsequent to successful action in the nature of ejectment plaintiff sued for trespass and trover for conversion of timber cut on the land while the defendants were in possession).

Keogh v. Peck, 316 Ill. 318, 325, 147 N.E. 266, 268 (1925).

Camden Trust Co. v. Handle, 132 N.J. Eq. 97, 26 A.2d 865, 867 (Ct. Err. & App. 1942). “Waste at common law ‘is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the dishersion of that hath the remainder or reversion in fee simple or fee tail.’” (quoting Blackstone’s Com. 281).

Lytle v. Payette-Oregon Slope Irr. Dist., 175 Or. 276, 288, 152 P.2d 934, 939 (1944).

Cecil v. Clark, 49 W. Va. 459, 39 S.E. 202 (1901).

West’s Key Number Digest, Damages ⇨67, 69, 107, 109, 217.

West’s Key Number Digest, Ejectment ⇨129.

West’s Key Number Digest, Waste ⇨7 to 10, 18.

2 Ally Windsor Howell, Alabama Personal Injury & Torts § 10:18 (2016 ed.).

Jenelle Mims Marsh, Alabama Law of Damages §§ 8:4, 33:1, 34:7 (5th ed. 2012).

2 Michael J. Roberts, Alabama Tort Law § 41.03 (6th ed. 2015).

Am. Jur. 2d, Ejectment §§ 51, 476, 487, 493.

Am. Jur. 2d, Waste §§ 1 to 10, 18.

Black’s Law Dictionary p. 1584 (7th ed. 1999).

Active (commissive) waste: Waste caused by the affirmative act of the tenant.

Permissive waste: A tenant’s failure to make normal repairs to property so as to protect it from substantial deterioration.

**APJI 22.18A STATUTORY EJECTMENT—
DAMAGES—PUNITIVE [PL]**

(Name of plaintiff) asks you to award punitive damages against (name of defendant(s)).

Punitive damages are awarded to a plaintiff to punish a defendant for (his/her/its) wrongful conduct, and to protect the public by deterring or discouraging the defendant and others from doing the same or similar wrongs in the future.

Before you can award punitive damages (1) you must have decided to award (name of plaintiff) compensatory or nominal damages; and (2) (name of plaintiff) must have proved by clear and convincing evidence that (name of defendant) consciously or deliberately acted toward (name of plaintiff) with wantonness.

(Wantonness is conduct that is carried on with a reckless or conscious disregard of the rights or safety of others.)

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim and a high probability that your conclusion is correct.

Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt.

Approved March 10, 2017

Notes on Use

Former APJI 13.15 was based on Ala. Code § 6-6-296 (1975) (West's Alabama Code). It states: "In case of wanton aggression or wanton entry on the part of the defendant, the jury may award exemplary or punitive damages." Section 6-11-20 (1987 Ala. Acts 185) applies to "any civil action"; therefore, that code section authorizes and sets the standards under which the jury may award punitive damages in a statutory ejectment action.

References

Espinoza v. Rudolph, 46 So. 3d 403 (Ala. 2010).

The trial judge entered a general judgment for compensatory and punitive damages on plaintiff's claims for ejectment, statutory ejectment, trespass, and slander of title. The Court affirmed the trial judge's judgment but it did not discuss whether Ala. Code § 6-11-20 (1975) (West's Alabama Code) governed the award of punitive damages.

Jones v. Regions Bank, 25 So. 3d 427 (Ala. 2009).

Knox v. Criddle, 490 So. 2d 913 (Ala. 1986) (decided under Ala. Code § 6-6-296 (1975) (West's Alabama Code)).

West's Key Number Digest, Damages ☞87(1), 87(2).

West's Key Number Digest, Ejectment ☞131.

2 Ally Windsor Howell, Alabama Personal Injury & Torts § 10:18 (2017 ed.).

Jenelle Mims Marsh, Alabama Law of Damages § 34:7 (6th ed. 2012).

Am. Jur. 2d, Ejectment § 51.

C.J.S., Ejectment § 245.

**APJI 22.19A STATUTORY EJECTMENT—
LIMITATION OF DAMAGES FOR
RENTS—POSSESSION UNDER
COLOR OF TITLE [PL]**

(Name of defendant) says (he/she/it) was holding the land under color of title and in good faith. If you determine this is true, (name of defendant) is liable for rent only for the year before (name of plaintiff) filed this lawsuit.

Color of title is an instrument or writing which claims to transfer title or a right of possession, but in reality, does not.

Good faith means (name of defendant) honestly believed (his/her/its) title was valid.

Approved May 5, 2017

Notes on Use

Use this instruction in an action in ejectment when there is evidence that a defendant holds possession under color of title, in good faith.

What constitutes color of title is a question of law. *Black v. Tennessee Coal, Iron & Railroad Co.*, 93 Ala. 109, 113, 9 So. 537, 538 (1891).

See APJI 22.16A notes on use and the discussion about *Cade v. Graffo*, 227 Ala. 11, 148 So. 591 (1933).

References

Ala. Code § 6-6-289 (1975) (West's Alabama Code).

Green v. Dixon, 727 So. 2d 781, 784 (Ala. 1998). A void tax deed is color of title. “Any instrument purporting to convey an interest in land may be color of title; however defective or imperfect it is, and no matter from what cause it is invalid.” *Id.* quoting *Edmonson v. Colwell*, 504 So. 2d 235, 236 (Ala. 1987).

Bergen v. Dixon, 527 So. 2d 1274, 1277 (Ala. 1988) (quoting *Davis v. Townsend*, 435 So. 2d 1280, 1282 (Ala. 1983)). Color of

title is “ ‘a writing which, in appearance, purports to transmit title or the right of possession, but which in reality, does not.’ ”

Lathem v. Lee, 249 Ala. 532, 32 So. 2d 211 (1947).

Cornelius v. Bishop, 205 Ala. 503, 508, 88 So. 592, 296 (1921).

Bowles v. Lowery, 181 Ala. 603, 62 So. 107 (1913).

Wyman v. Walker, 177 Ala. 72, 58 So. 403 (1912). A mere bona fide possession under claim of right, but without color of title, is not sufficient to exempt from rent beyond a year before the commencement of the suit.

Keith v. McLaughlin, 114 Ala. 60, 63–64, 21 So. 483 (1897).

Nashville, C. & St. L. Ry. Co. v. Mathis, 109 Ala. 377, 19 So. 384 (1896).

Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 So. 760 (1890).

Dobbs v. Hairston, 80 Ala. 594, 2 So. 880 (1887).

Dozier v. Mitchell, 65 Ala. 511, 520, 1880 WL 1205 (1880).

West's Key Number Digest, Adverse Possession ☞68.

West's Key Number Digest, Ejectment ☞132.

7A Words and Phrases, p. 309.

**APJI 22.20A STATUTORY EJECTMENT—
DAMAGES—TENANT [PL]**

(Name of defendant) says (he/she/it) possessed the land under a (lease/license) from (name).

If (name of defendant) is responsible for damages, (he/she/it) is responsible for only:

1. Any rent (name of defendant) owed when (name of plaintiff) filed this lawsuit; and,
2. Any rent that becomes due while (name of defendant) stays in possession of the land.

Approved March 10, 2017

Notes on Use

Use this instruction when the plaintiff seeks to recover only rents and a tenant is in possession and claims the right to possession under a lease or license from another.

The facts of the case may necessitate the user consider this instruction in conjunction with Ala. Code § 6-6-289 (1975) (West's Alabama Code) and APJI 22.16A. *Scott v. Coulson*, 156 Ala. 450, 47 So. 60 (1908).

See Ala. Code § 6-6-287, Joinder of Landlord.

References

Ala. Code § 6-6-288 (1975) (West's Alabama Code) states:

“A tenant in possession, asserting his right thereto under a lease or license from another, is not liable beyond the rent in arrears at the commencement of the action and that which may accrue during the continuance of his possession.”

Jones v. Scott, 249 Ala. 336, 31 So. 2d 361 (1947).

Scott v. Coulson, 156 Ala. 450, 47 So. 60 (1908).

West's Key Number Digest, Ejectment ⇨ 46, 47, 49, 125, 127.

APJI 22.20A ALABAMA PATTERN JURY INSTRUCTIONS

West's Key Number Digest, Remainders ☞17(1), 17(4).

Am. Jur. 2d, Ejectment §§ 23, 24.

**APJI 22.21A STATUTORY EJECTMENT—
DAMAGES—TWO OR MORE
DEFENDANTS [PL]**

If you find for (name of plaintiff), you may award (him/her/it) damages against (names of defendants) in one of two ways.

1. You may award damages for (name of plaintiff) against each defendant for the distinct harm that the defendant caused; or,

2. You may award damages for (name of plaintiff) jointly against the defendants.

How you award damages for (name of plaintiff) and against the defendants depends on what you decide based on the evidence.

Approved March 10, 2017

Notes on Use

Use this instruction in a statutory ejectment action when there are two or more defendants.

References

Ala. Code § 6-6-295 (1975) (West’s Alabama Code) states:

“When there are more defendants than one, the jury may assess the damages arising from the detention of the land and the injury and waste thereto, in severalty against each defendant for distinct damages.”

McCay v. Parks, 201 Ala. 647, 79 So. 119 (1918).

Morris v. Beebe, 54 Ala. 300, 1875 WL 1314 (1875).

West’s Key Number Digest, Ejectment ☞1 et seq.

APJI 22.21A

ALABAMA PATTERN JURY INSTRUCTIONS

APJI 22.22A to 22.24A

Reserved

QUIET TITLE [PL]

APJI 22.25B QUIET TITLE—ELEMENTS AND BURDEN OF PROOF [PL]

READ NOTES ON USE

This is a lawsuit to quiet title to land.

Plaintiff (name of plaintiff) filed this lawsuit against defendant (name of defendant) to determine and settle the title to land, and to clear up all doubts or disputes about the title. The land involved is (give a brief description of the land).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence that when (he/she/it) filed this lawsuit:

1. That (he/she/it) was in peaceable possession of the land. The possession can be actual or constructive; and,
2. That no other lawsuit was pending to test the validity of title to the land.

If (name of plaintiff) proved all of these things, you must find for (him/her/it) and against (name of defendant).

Approved Jan. 5, 2018

Notes on Use

Use this instruction in an in personam action to quiet title when a party has demanded a jury trial. Ala. Code § 6-6-543 (1975) (West's Alabama Code). A trial by jury is not guaranteed in an in rem action. Whether one may be available “depends upon the nature of the [parties’] claim to title. . . .” 1 Jesse P. Evans III, Alabama Property Rights and Remedies § 10.10[a] (5th ed. 2012).

The instruction assumes the defendant did not introduce evidence of title or a claim of title. If the defendant did introduce such evidence, the plaintiff must prove a third element:

3. That (name of plaintiff)’s title is superior to (name of defendant)’s title.

Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass’n, Inc., 947 So. 2d 1031, 1036 (Ala. 2006) states the burden-shifting analysis.

Legal title is “[a] title that evidences apparent ownership but does not necessarily signify full and complete title or beneficial interest.” Woodland Grove at 1041 n. 10 (quoting Black’s Law Dictionary 1523 (8th ed. 2004)).

To recover, the plaintiff must have “peaceable possession and a claim of title, not actual ownership.” Boyett v. Wolf Bay Associates, 568 So. 2d 765, 767 (Ala. 1990). Brewster v. Soterra, LLC, 53 So. 3d 145 (Ala. Civ. App. 2010).

See APJI 22.26B, Quiet Title—Peaceable Possession—Defined.

See APJI 22.27B, Quiet Title—Actual Possession—Defined.

See APJI 22.28B, Quiet Title—Constructive Possession—Defined.

References

Ala. Code §§ 6-6-540 to 546 (1975) (West’s Alabama Code) (In personam action).

Ala. Code §§ 6-6-560 to 573 (1975) (West’s Alabama Code) (In rem action).

Childers v. Darby, 163 So. 3d 323 (Ala. 2014).

Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass’n, Inc., 947 So. 2d 1031 (Ala. 2006).

Cobb v. MacMillan Bloedel, Inc., 604 So. 2d 344 (Ala. 1992).

Gardner v. Key, 594 So. 2d 43 (Ala. 1991) (Mem.).

Wiggins v. Stapleton Baptist Church, 282 Ala. 255, 210 So. 2d 814 (1968).

Stewart v. Childress, 269 Ala. 87, 111 So. 2d 8 (1959).

Brewster v. Soterra, LLC, 53 So. 3d 145 (Ala. Civ. App. 2010).

West's Key Number Digest, Quieting Title Ⓒ44(1).

1 Jesse P. Evans III, Alabama Property Rights and Remedies §§ 10.6 to 10.11 (5th ed. 2012).

Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1, et seq.

Jerome A. Hoffman & William A. Schroeder, Burdens of Proof, 38 Ala. L. Rev. 31, 55 (1986).

**APJI 22.26B QUIET TITLE—PEACEABLE
POSSESSION—DEFINED [PL]**

The word peaceable refers to the character of (name of plaintiff)'s possession of the land. The possession is peaceable, as opposed to disputed or scrambling, if at the time suit is filed no other party is denying the fact of (name of plaintiff)'s possession.

(If a party disputes (name of plaintiff)'s right to possession, this alone does not mean (name of plaintiff)'s possession is not peaceable.)

(Isolated acts that indicate possession but do not amount to an interference with peaceable possession are not enough. The disputing party's conduct must indicate that (he/she/it) claims to be in possession of the land.)

You must determine whether (name of plaintiff) was in peaceable possession of the land.

Approved Jan. 5, 2018

References

Childers v. Darby, 163 So. 3d 323 (Ala. 2014).

Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass'n, Inc., 947 So. 2d 1031 (Ala. 2006).

Denson v. Gibson, 392 So. 2d 523 (Ala. 1980).

Ford v. Washington, 288 Ala. 194, 259 So. 2d 226 (1972).

Webb v. Griffin, 243 Ala. 468, 10 So. 2d 458 (1942).

George E. Wood Lumber Co. v. Williams, 157 Ala. 73, 47 So. 202 (1908).

Brewster v. Soterra, LLC, 53 So. 3d 145 (Ala. Civ. App. 2010).

West's Key Number Digest, Quieting Title ◊12, 12(7), 12(9), 23, 44(5).

1 Jesse P. Evans III, *Alabama Property Right and Remedies* § 10.2[d], 10.2[e] (5th ed. 2012).

Am. Jur. 2d, *Quieting Title and Determination of Adverse Claims* § 37.

**APJI 22.27B QUIET TITLE—ACTUAL
POSSESSION—DEFINED [PL]**

Actual possession generally refers to the physical occupation of the land by the party, or (his/her/its) agent or tenant. This means an actual occupancy or some act such as residence, cultivation, cutting timber, or like activities on the land for which it is reasonably suited.

Approved Jan. 5, 2018

References

Childers v. Darby, 163 So. 3d 323 (Ala. 2014).

Woodland Grove Baptist Church v. Woodland Grove Community Cemetery Ass’n, Inc., 947 So. 2d 1031 (Ala. 2006).

North Clarke Water Authority v. Dockery, 5 So. 3d 634 (Ala. Civ. App. 2008).

West’s Key Number Digest, Property ¶10.

1 Jesse P. Evans III, Alabama Property Rights and Remedies § 10.2[b] (5th ed. 2012).

Am. Jur. 2d, Quieting Title and Determination of Adverse Claims § 37.

Black’s Law Dictionary 1183 (7th ed. 1999).

**APJI 22.28B QUIET TITLE—CONSTRUCTIVE
POSSESSION—DEFINED [PL]**

A person has constructive possession of land when:

1. (He/she/it) is not in actual possession of the land;
and,
2. (He/she/it) has legal title to the land or ownership
that gives (him/her/it) the right to immediate possession of
the land.

(If neither party has actual possession, the holder of
legal title has constructive possession.)

Approved Jan. 5, 2018

References

Childers v. Darby, 163 So. 3d 323, 328 (Ala. 2014).

Woodland Grove Baptist Church v. Woodland Grove
Community Cemetery Ass’n, Inc., 947 So. 2d 1031, 1037 (Ala. 2006).

Denson v. Gibson, 392 So. 2d 523, 524 (Ala. 1980).

Walthall v. Yohn, 252 Ala. 262, 40 So. 2d 705 (1949).

Kyle v. Alabama State Land Co., 147 Ala. 698, 41 So. 174
(1906).

West’s Key Number Digest, Quieting Title ☞12, 12(7), 44(1).

1 Jesse P. Evans III, Alabama Property Rights and Remedies
§ 10.2[c] (5th ed. 2012).

Black’s Law Dictionary 1183 (7th ed. 1999).

APJI 22.29B ALABAMA PATTERN JURY INSTRUCTIONS

**APJI 22.29B QUIET TITLE—ADVERSE
POSSESSION [PL]**

See 1 APJI 22.08A, Statutory Ejectment—Adverse Possession (3rd ed. 2017-2018).

Approved Jan. 5, 2018

Additional References

Ex parte Cottrell, 188 So. 3d 661 (Ala. 2014).

1 Jesse P. Evans III, Alabama Property Rights and Remedies §§ 10.3 to 10.5 (5th ed. 2012).

**APJI 22.30B QUIET TITLE—PRESCRIPTION—
DEFINED [PL]**

See 1 APJI 22.09A, Statutory Ejectment—Prescription
(3rd ed. 2017-2018).

Approved Jan. 5, 2018

Additional References

1 Jesse P. Evans III, Alabama Property Rights and Remedies
§§ 10.3 to 10.5 (5th ed. 2012).

APJI 22.31B ALABAMA PATTERN JURY INSTRUCTIONS

**APJI 22.31B QUIET TITLE—COLOR OF
TITLE—DEFINED [PL]**

Color of title is an instrument or writing which claims to transfer title or a right of possession, but in reality, does not.

Approved Jan. 22, 2018

Notes on Use

The trial judge may use this instruction when he or she has a reason to define the concept in an action to quiet title or a claim of adverse possession. The definition in 1 APJI 22.08A, Statutory Ejectment—Adverse Possession p. 367 (3rd ed. 2017-2018) is inaccurate, and it is corrected in the online version of this work.

To operate as color of title, the instrument or writing must adequately describe the land in controversy.

References

Oehmig v. Johnson, 638 So. 2d 846, 848, 128 O.G.R. 1 (Ala. 1994), abrogated on other grounds, Ex parte Liberty Nat. Life Ins. Co., 825 So. 2d 758 (Ala. 2002).

Jesse P. Evans III, Alabama Property Rights and Remedies § 10.1 [b] [iii] (5th ed. 2012).

**APJI 22.32B QUIET TITLE—DESCENT CAST—
DEFINED [PL]**

Descent cast is a technical term that applies when a person without color of title dies in possession of land. If (his/her) heirs continue to possess the land, the law is their possession is under color of title.

Approved Jan. 5, 2018

Notes on Use

The definition is the same definition stated in 1 APJI 22.08A, Statutory Ejectment—Adverse possession p. 367-38 (3rd ed. 2018-2019).

References

Parrish v. Davis, 265 Ala. 522, 92 So. 2d 897 (1957).

White v. Williams, 260 Ala. 182, 69 So. 2d 847 (1954).

APJI 22.33B to 22.34B

Reserved

FORCIBLE ENTRY AND DETAINER [PL]

APJI 22.35C FORCIBLE ENTRY AND DETAINER—GENERAL INSTRUCTIONS [PL]

Lease

A lease is an agreement between the plaintiff and the defendant that gives the defendant a possessory interest in the land or building the plaintiff leases to the defendant. The plaintiff is usually called the landlord, and the defendant is usually called the tenant.

Possessory interest means the defendant's right to use and occupy the land or building for the period the plaintiff and defendant agreed. The possessory interest is also called a tenancy. There are several types of tenancies.

A lease is for a certain period. That period is called the term of the lease.

Usually, a lease is written, but it does not have to be written if the term is no longer than a year.¹ The lease may have many requirements and obligations. When necessary, I will tell you what lease requirements or obligations are important for you to decide this case.

22.35C

¹Ala. Code § 8-9-2 (5) (1975) (West's Alabama Code). See generally *Ex parte Burke*, 249 Ala. 93, 29 So. 2d 875 (1947); *Hackney v. Griffin*, 244 Ala. 360, 13 So. 2d 772 (1943); West's Key Number Digest, Statute of Frauds Ⓒ44(4), 58(1), 123(.5) to (3), 129(8), 129(12); West's

Key Number Digest, Landlord and Tenant Ⓒ540; Dow T. Huskey & Stephen T. Etheredge, Ala. Landlord & Tenant Breach & Remedies § 1-2 p. 2 (The Harrison Co. 1981). A lease for more than twenty years must be in writing, and it must contain words of conveyance and be recorded within one year. Ala. Code § 35-4-6.

In exchange for the right to use and occupy land or buildings, the tenant agrees, among other things, to pay rent.

Unlawful Detainer—Termination of Tenant’s Possessory Interest

The defendant’s (tenant’s) possessory interest must be terminated and (he/she/it) must have failed or refused to deliver possession of the (land/building) before the plaintiff (landlord) can recover in a lawsuit for unlawful detainer.²

A written lease may state how the plaintiff must terminate the possessory interest. When it does, the plaintiff must strictly follow the requirements.³

Alabama statutes may control how this must be done. When they do, I will instruct you about ten-day notices or ten-day notices to quit. The notices tell the tenant when (his/her/its) right to use and occupancy ends.

Finally, under certain circumstances, the tenant’s conduct can terminate (his/her/its) possessory interest.

Holding Over

Holding over means the tenant uses and occupies the land or buildings after the term of the lease or after (his/her/its) possessory interest is terminated.

Approved March 9, 2018

Notes on Use

These instructions are a brief overview of the law. They are intended to familiarize the jury with the meanings of terms that the lawyers or the trial judge will use during the trial, and in the trial judge’s instructions at the end of the case.

²1 Jesse P. Evans III, Alabama Property Rights and Remedies § 21.5[b] p. 21-12 (6th ed. 2012).

³Arlen Realty, Inc. v. Dozier,

393 So. 2d 489 (Ala. Civ. App. 1980); HealthSouth Rehabilitation Corp. v. Falcon Management Co., 799 So. 2d 177 (Ala. 2001).

APJI 22.35C**ALABAMA PATTERN JURY INSTRUCTIONS**

Use only the general instructions that apply to the issues in the case at trial.

**APJI 22.36C FORCIBLE ENTRY—ELEMENTS—
ALA. CODE § 6-6-310 (1) (1975)
(WEST’S ALABAMA CODE) [PL]**

Plaintiff (name of plaintiff) sues the defendant (name of defendant) to recover possession of (describe the land/building). (Name of plaintiff) says (name of defendant) forcibly entered and took possession when (describe the defendant’s conduct). (Name of plaintiff) says (name of defendant) is still in possession.

((Name of plaintiff) also sues (name of defendant) for damages for (describe the damages the plaintiff seeks).)

To recover, (name of plaintiff) must reasonably satisfy you from the evidence:

1. That (name of plaintiff) actually possessed the (land/building); and,
2. That (name of defendant) forcibly entered upon and unlawfully detained the (land/building).
- (3. (Name of defendant)’s entry and detention upon the (land/building) harmed (name of plaintiff).)

If (name of plaintiff) proves all these things, you must find for (him/her/it). (Then, you must determine how much money to award (name of plaintiff).)

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved February 9, 2018

Notes on Use

The instruction does not list the various types of conduct stated as examples in Ala. Code § 6-6-310(1) (1975) (West’s Alabama Code) that may constitute forcible entry and detainer. See 2 A.P.J.I. 36.23 (3rd ed. 2017-2018).

Use APJI 22.37C when the entry is peaceable.

When the defendant removes a boundary fence, the cases are not in harmony on whether the entry is forcible or peaceable. See *Stephenson v. Thompson*, 254 Ala. 248, 48 So. 2d 306 (1950) (removal of boundary line fence affixed to trees in the woods was forcible entry). *Contra Lipscomb v. Moore*, 228 Ala. 365, 153 So. 393 (1934) (mere removal of fence and laying posts and wires on plaintiff's land was peaceable entry). *Accord Farley v. Bay Shell-Road Co.*, 125 Ala. 184, 27 So. 770 (1900) (mere removal of old boundary fence and placing new fence in plaintiff's road was peaceable entry). But *Cf McGonegal v. Walker*, 23 Ala. 361, 1853 WL 254 (1853) (whether the defendant's entry and removal of fence was forcible was a jury question).

References

Ala. Code § 6-6-310(1) (1975) (West's Alabama Code) states: **FORCIBLE ENTRY AND DETAINER**. "Where one by force or strong hand, or by exciting fear or terror, enters upon and detains lands or tenements in the possession of another, as by breaking open doors, windows or any other part of a house, whether any person is within or not, by threats of violence to the party in possession, or by words or actions that have a tendency to excite fear or apprehension of danger, by putting out of doors or removing the goods or chattels of the party in possession, or by entering peaceably and then by unlawful refusal, or by force or threats, turning, or keeping the party out of possession."

Ala. Code § 6-6-311 (1975) (West's Alabama Code).

Ala. Code § 6-6-312 (1975) (West's Alabama Code).

Ala. Code § 6-6-336 (1975) (West's Alabama Code).

Stephenson v. Thompson, 254 Ala. 248, 48 So. 2d 306 (1950).

Lipscomb v. Moore, 228 Ala. 365, 153 So. 393 (1934).

Harris v. Harris, 190 Ala. 619, 67 So. 465 (1914).

Farley v. Bay Shell-Road Co., 125 Ala. 184, 27 So. 770 (1900).

McGonegal v. Walker, 23 Ala. 361, 1853 WL 254 (1853).

West's Key Number Digest, Forcible Entry and Detainer ☞4 to 7.

Jenelle Mims Marsh, Alabama Law of Damages § 36:31 (6th ed. 2012).

1 Jesse P. Evans III, Alabama Property Rights and Remedies §§ 21.1 to 21.2, 21.5[b], 21.6 to 21.14 (5th ed. 2012).

Am. Jur. 2d, Forcible Entry and Detainer §§ 1 to 7, 28 to 31.

**APJI 22.37C PEACEABLE ENTRY—
ELEMENTS—ALA. CODE § 6-6-
310(1) (1975) (WEST’S ALABAMA
CODE) [PL]**

Plaintiff (name of plaintiff) sues the defendant (name of defendant) to recover possession of (describe the land/building).

(Name of plaintiff) says (name of defendant) peaceably entered the (land/building), but refused (name of plaintiff)’s demand for possession of the (land/building). (Name of plaintiff) says (describe the circumstances of defendant’s refusal to vacate).

((Name of plaintiff) also sues (name of defendant) for damages (describe the damages plaintiff seeks).)

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) was in actual possession of the (land/building);

2. That (name of defendant) peaceably entered upon the (land/building);

3. That (name of plaintiff) demanded possession from (name of defendant); and,

4. That

a. (name of defendant) unlawfully refused to give up possession to (name of plaintiff),

or

b. (name of defendant) used force or threats to deny (name of plaintiff)’s possession.

(5. That (name of defendant)’s refusal to give up possession damaged (name of plaintiff).)

If (name of plaintiff) proved all these things you must find for (him/her/it) and against (name of defendant). (Then, you must determine the amount of money to award (name of plaintiff).)

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Demand and refusal.

Direct testimony may show (name of plaintiff)'s demand for possession, or you may infer it from the parties' acts and conduct.

It is not essential (name of plaintiff)'s demand for possession be in writing or in direct or positive terms.

Unlawful refusal.

(Name of plaintiff)'s demand for possession must have been lawful. The demand is lawful if (name of plaintiff) had actual possession of the (land/building) on which (name of defendant) intruded.

It is not essential that (name of plaintiff) base the demand on ownership of the (land/building) or title. If (name of plaintiff) had actual possession, (name of defendant)'s refusal to give up possession is unlawful.

If you find (name of plaintiff) demanded possession, you must then determine if (name of defendant) refused the demand. To determine this issue, you may consider (his/her/its) (silence/ failure to comply with a demand). You should consider these things along with all the other evidence to determine whether or not (name of defendant) unlawfully refused to give up possession.

Approved February 9, 2018

Notes on Use

Use this instruction when defendant entered possession peace-

ably, or when there is a question of fact whether the entry was peaceable.

References

Ala. Code § 6-6-310(1) (1975) (West's Alabama Code).

Ala. Code § 6-6-314 (1975) (West's Alabama Code).

See references to APJI 22.36C.

West's Key Number Digest, Forcible Entry and Detainer ⇨5,
6.

Am. Jur. 2d, Forcible Entry and Detainer §§ 1 to 7, 27 to 32.

**APJI 22.38C UNLAWFUL DETAINER—
ELEMENTS—ALA. CODE § 6-6-310
(2) (1975) (WEST'S ALABAMA
CODE) [PL]**

Plaintiff (name of plaintiff) sues the defendant (name of defendant) to recover possession of (describe the land/building). (Name of plaintiff) says (name of defendant) leased the (land/building) and (describe defendant's conduct, e.g., defendant defaulted, the lease expired by its terms, etc.).

(Name of plaintiff) says (he/she/it) terminated the lease, but (name of defendant) remains in possession of the (land/building).

((Name of plaintiff) also sues (name of defendant) for damages for (describe the damages the plaintiff claims).)

(Name of defendant) says (name of plaintiff) is not entitled to recover because (state defendant's defenses).

To recover, (name of plaintiff) must reasonably satisfy you from the evidence:

1. That

- a. (he/she/it) had actual prior possession of the (land/building);

or

- b. (name of plaintiff)'s grantor (name) had actual prior possession of the (land/building);

2. That (name of defendant) entered the (land/building) as (name of plaintiff)'s tenant;

3. That (name of plaintiff) terminated (name of defendant)'s possessory interest, and gave (name of defendant) notice of the termination by (describe the notice, e.g., in accordance with the default and termination provisions in the lease, 10-day notice in writing, etc.); and,

4. That (name of defendant) unlawfully failed or refused to give up possession to (name of plaintiff).

(5. That (name of defendant)’s (failure/refusal) to give up possession harmed (name of plaintiff).)

If (name of plaintiff) proved all these things, you must find for (him/her/it) and against (name of defendant). (Then, you must determine the amount of money to award (name of plaintiff).)

If (name of plaintiff) did not prove all these things, (or (name of defendant) has shown (name of plaintiff) is not entitled to recover), you must find for (name of defendant).

Approved February 9, 2018

Notes on Use

1996 Ala. Acts 573 amended § 6-6-310 and removed “the requirement that a landlord has to provide a second 10-day notice to a tenant who breaches a lease; . . .”

Notice may not be required in all cases, e.g., when the lease is for a fixed term and the term has expired. *H.G. Hill Co. v. Taylor*, 232 Ala. 471, 168 So. 693 (1936).

Ala. Code § 6-6-336 (1975) (West’s Alabama Code) states: “The estate or merits of the title cannot be inquired into on the trial of any complaint in forcible entry and detainer or unlawful detainer; but all legal and equitable defenses may be had against a recovery for damages or for the unlawful detention of the land.”

References

Ala. Code § 6-6-310(2) (1975) (West’s Alabama Code) states: “(2) UNLAWFUL DETAINER. Where one who has lawfully entered into possession of lands as tenant fails or refuses, after the termination of the possessory interest of the tenant, to deliver possession of the premises to anyone lawfully entitled or his or her agent or attorney.”

Ala. Code § 6-6-336 (1975) (West’s Alabama Code).

Paint Rock Turf, LLC v. First Jackson Bank, 169 So. 3d 990

(Ala. 2014) distinguishes a tenant at will from a tenant at sufferance.

Drummond Co., Inc. v. Walter Industries, Inc., 962 So. 2d 753, 166 O.G.R. 695 (Ala. 2006) defines a tenant at will by implication, i. e., as a result of judicial interpretation. A tenant at will by implication is allowed a reasonable time to vacate the premises.

Gulf Coast Realty Co., Inc. v. Professional Real Estate Partners, Inc., 926 So. 2d 992 (Ala. 2005). When the tenancy is year-to-year, “[T]he general rule is that, in the absence of an agreement between the parties, a month’s notice prior to the end of the leasehold period, when that period is a month or more, is adequate.” *Brown v. Williams*, 576 So. 2d 195, 197 (Ala. 1991) (citing 1 Restatement (Second) of Property: Landlord and Tenant § 1.5(f)).”

Womack v. Hyche, 503 So. 2d 832 (Ala. 1987). Tenant at will by implication.

Matthews v. Donald, 259 Ala. 151, 66 So. 2d 195 (1953). In action in unlawful detainer against two defendants, complaint alleging that plaintiff sued to recover possession of described property upon which the defendant had lawfully entered on demise of plaintiff and which the defendant, after termination of his possessory interest and after plaintiff’s demand in writing therefor, unlawfully detained, was insufficient in that it failed to allege with sufficient certainty the identity of the tenant or person who entered the premises under the demise.

East v. Tingley, 254 Ala. 309, 48 So. 2d 316 (1950). The action is limited to those occupying the relationship of landlord and tenant or those succeeding to their possessory relation.

Adams v. Riddle, 233 Ala. 96, 170 So. 343 (1936). The action will not lie to recover mineral interests.

Messer v. Dupuy-Burke Realty Co., 226 Ala. 438, 147 So. 193 (1933). Question of extension and modification of lease and of time and amount of payments of installments on rent, pursuant to oral agreement, held for jury, in unlawful detainer suit.

Sandlin v. Anders, 205 Ala. 453, 88 So. 560 (1921). When a party to an unlawful detainer suit enters a plea disclaiming any title or right of possession, a demurrer to the plea is properly overruled, such person not being a proper party defendant.

Edwards v. Louisville & N.R. Co., 202 Ala. 463, 80 So. 847

(1918). Although an unlawful detainer action is possessory and grows out of the relation of the landlord and tenant, a re-renting or subletting of a part of the premises, or any collusions by which other parties are placed in possession of a part of the premises, will not defeat the action. When the defendant in an unlawful detainer action entered into the possession of the property, by virtue of being the wife of deceased lessee, she will be estopped from setting up title adverse to lessor, while retaining such possession.

Hill v. Harris, 179 Ala. 614, 60 So. 917 (1913). A purchaser from the landlord during the tenancy cannot maintain the action of unlawful detainer, unless the tenant has attorned to him, though such purchaser acquired all of his grantor's rights under the lease without express attornment. The lessor's alienation of the premises, whether voluntary or involuntary, cannot be considered in defense to his action for unlawful detainer to recover the possession as that would involve a consideration of title, but there is an apparent exception in case of a descent cast by law upon the lessor's heirs pending the lease and they may maintain the action in place of their ancestor.

West's Key Number Digest, Forcible Entry and Detainer ☞5, 6.

West's Key Number Digest, Landlord and Tenant ☞1780 to 1789.

West's Key Number Digest, Mines and Minerals ☞63, 70, 70(1).

Jenelle Mims Marsh, Alabama Law of Damages §§ 28:15, 28:25, 36:31 (6th ed. 2012).

1 Jesse P. Evans III, Alabama Property Rights and Remedies §§ 21.2[c] to 21.13[c] (5th ed. 2012).

Am. Jur. 2d, Forcible Entry and Detainer §§ 1 to 7, 27 to 32.

**APJI 22.39C TERMINATION OF POSSESSORY
INTEREST OR NOTICE TO QUIT
[PL]**

Before (name of plaintiff) can recover possession of the (land/building) (and damages), (name of defendant)'s right to possess the (land/building) must terminate. (Name of defendant)'s right to possess the (land/building) is commonly called (his/her/its) tenancy.

(Name of defendant)'s right to possess the (land/building) can be terminated by:

(A ten-day notice to quit that (name of plaintiff) gave (name of defendant).)

OR

(An agreement between the plaintiff and the defendant.)

OR

((Name of defendant)'s acts or failure to act.)

(Name of plaintiff) must prove to your reasonable satisfaction from the evidence that (name of defendant)'s right to possess the (land/building) terminated.

Approved March 9, 2018

Notes on Use

Use this instruction when the tenant defaults under the lease, but the lease does not provide a procedure to terminate the tenant's possessory interest.

1996 Ala. Acts 573 amended Ala. Code § 6-6-310(2) and deleted the second ten-day notice requirement under that sub-section.

This instruction does not cover all circumstances when notice is required to terminate the tenancy. The user must determine the kind of tenancy and consult the case law to determine the form of notice, if any, required.

References

Ala. Code §§ 35-9-6 and 35-9-7 (1975) (West's Alabama Code).

Speer v. Smoot, 156 Ala. 456, 47 So. 256 (1908).

West's Key Number Digest, Forcible Entry and Detainer
⌚11(.5) to (5).

West's Key Number Digest, Landlord and Tenant ⌚1794.

1 Jesse P. Evans III, *Alabama Property Rights and Remedies*
§ 21.5[c][iii] (5th ed. 2012).

Am. Jur. 2d, Forcible Entry and Detainer § 38.

Am. Jur. 2d, Landlord and Tenant §§ 110 to 124, 192 to 194,
218 to 222.

**APJI 22.40C TERMINATION OF POSSESSORY
INTEREST—STIPULATION [PL]**

(Name of plaintiff) and (name of defendant) agree (name of defendant)'s right to use and occupy the (land/building) has been terminated. You will accept that fact as admitted.

Approved March 9, 2018

**APJI 22.41C TERMINATION OF POSSESSORY
INTEREST—EXPIRATION OF
LEASE TERM [PL]**

(Name of defendant)'s possessory interest terminated without further notice if you are reasonably satisfied from the evidence:

1. That (name of plaintiff) and (name of defendant) agreed that (name of defendant) could use and occupy the (land/building) for a certain period; and,
2. That the period expired.

If (name of plaintiff) proved these things, (he/she/it) did not have to give (name of defendant) a ten-day notice to quit.

Approved March 9, 2018

References

Ala. Code § 35-9-8 (1975) (West's Alabama Code) states: "When a tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender possession, and no notice to quit or demand of possession is necessary."

Moss v. Hall, 245 Ala. 612, 18 So. 2d 368 (1944). When the tenant, in consideration of an extension of time for payment of the back rent, agreed to vacate premises on a fixed date, the agreement terminated the lease on such date and the landlord's vendee was entitled to possession without notice to quit or demand for possession.

At least one commentator has criticized the holding in *Moss v. Hall* as based on dictum. J. W. Jenkins, *Legal Dilemmas of Unlawful Detainers*, 6 Ala. L. Rev. 114 (Jan. 1945). He posits the Supreme Court of Alabama, through statutory interpretation, has thwarted the legislature's attempt to simplify the summary eviction process. See also J. Foy Guin, Jr., *Landlord and Tenant—Unlawful Detainer—Notice of Termination of Tenancy and Demand for Possession*, 8 Ala. L. Rev. 308 (1947). Their criticism is probably alleviated by the enactment of 1996 Ala. Acts 573 that removed the ten-day demand requirement form Ala. Code § 6-6-310(2) (1975) (West's Alabama Code).

See *Minor v. Hicks*, 235 Ala. 686, 180 So. 689 (1938) (decided under 1923 Code § 8001, now Ala. Code § 6-6-310(2), as amended in 1996). By terms of the lease, the tenancy is for a specific period of time, the expiration of time terminates the tenancy and the only notice required is the statutory written demand for possession of the leased premises. Under a lease of property for one year for specified rent, which lease did not specify when lessee was to surrender possession of property, the tenancy terminated with the last day of the year and the only notice lessee was entitled to was a statutory written demand for possession of the leased property.

Johnson v. Miller, 161 Ala. 632, 49 So. 858 (1909). When the tenant is already in wrongful possession of the premises, a notice from the landlord to quit is not necessary in order to enable him to maintain unlawful detainer.

Roberson v. Baldwin, 38 Ala. App. 269, 82 So. 2d 348 (1955).

West's Key Number Digest, Landlord and Tenant ¶931, 1786.

1 Jesse P. Evans III, *Alabama Property Rights and Remedies* § 25.5[c][iii] p. 21–13 (5th ed. 2012).

**APJI 22.42C TERMINATION OF POSSESSORY
INTEREST—TENANCY
DISAVOWED [PL]**

(Name of plaintiff) says (name of defendant) disavowed or disclaimed (he/she/it) used and occupied the (land/building) under a lease from (name of plaintiff). (He/she/it) says (name of defendant) disavowed or disclaimed the lease by (describe the defendant's conduct).

(Name of plaintiff) must reasonably satisfy you from the evidence that (name of defendant) disavowed or disclaimed that (he/she/it) used and occupied the (land/building) under a lease with (name of plaintiff).

If (name of defendant) disavowed or disclaimed a lease, the tenancy is forfeited and terminated.

Approved March 9, 2018

References

Martin v. Carroll, 259 Ala. 197, 66 So. 2d 69 (1953).

Sherrill v. Garth, 230 Ala. 397, 161 So. 482 (1935).

Wells v. Sheerer, 78 Ala. 142, 1884 WL 771 (1884).

Tillotson v. Kennedy, 5 Ala. 407, 1843 WL 206 (1843).

West's Key Number Digest, Landlord and Tenant ¶518, 890, 909, 1751, 1753, 1794(2).

1 Tiffany Real Property § 162 n. 66 (3rd ed. Sept. 2017).

1 Jesse P. Evans III, Alabama Property Rights and Remedies § 21.5[c][iii] (5th ed. 2012).

Am. Jur. 2d, Landlord and Tenant § 241.

**APJI 22.43C TERMINATION OF POSSESSORY
INTEREST—EXPRESS TENANCY
AT WILL—TEN-DAY NOTICE [PL]****READ NOTES ON USE**

(Name of plaintiff) says (name of defendant) was a tenant at will and (name of plaintiff) gave (him/her/it) a ten-day written notice that terminated the tenancy. (Name of plaintiff) says (name of defendant) held over past the time in the notice.

Tenancy at will exists when the tenant holds over by the landlord's express permission or consent.

(Name of plaintiff) must reasonably satisfy you from the evidence:

1. That a tenancy at will existed between (name of plaintiff) and (name of defendant);
2. That (name of plaintiff/name of plaintiff's agent) gave (name of defendant) a ten-day written notice to quit; and,
3. That (name of defendant) held over past the time in the notice.

If (name of plaintiff) proved all these things, you must find (he/she/it) terminated (name of defendant)'s possessory interest.

Approved March 9, 2018

Notes on Use

Use this instruction in unlawful detainer when there is an express tenancy at will.

Tenancies at will by implication, i.e., by judicial interpretation, are governed by common law; the ten-day notice requirement

under Ala. Code § 35-9-3 (1975) (West's Alabama Code) does not apply. The landlord must give reasonable notice to quit, and whether the landlord gave reasonable notice is determined by the circumstances of the case. *Drummond Co., Inc. v. Walter Industries, Inc.*, 962 So. 2d 753, 166 O.G.R. 695 (Ala. 2006).

References

Ala. Code § 35-9-3 (1975) (West's Alabama Code) states: "Where no time is specified for the termination of tenancy, the law construes it to be from December 1 to December 1 but if it is expressly a tenancy at will, then either party may terminate it at will, by 10 days' notice in writing."

Ala. Code §§ 35-9-5 (1975) (West's Alabama Code) states: "In all cases of tenancy by the month or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by giving the tenant 10 days' notice in writing of such termination, and the landlord upon giving said notice for said time shall be authorized without further notice to the tenant to recover possession of the rented premises in an action of unlawful detainer."

Drummond Co., Inc. v. Walter Industries, Inc., 962 So. 2d 753, 166 O.G.R. 695 (Ala. 2006).

Garrett v. Reid, 244 Ala. 254, 13 So. 2d 97 (1943). Jury question presented as to how the tenant held over. The notice herein applies only to tenancies which are expressly tenancies at will.

Buchmann v. Callahan, 222 Ala. 240, 131 So. 799 (1930). The distinguishing feature between "tenant at will" and "tenant at sufferance" is one of consent to continued occupancy. A tenant at sufferance enters lawfully and holds over wrongfully without the landlord's assent or dissent. But a tenant at will holds over by the landlord's permission.

O'Connor v. Brinsfield, 212 Ala. 68, 101 So. 679 (1924). A tenant in common in possession after expiration of lease under which he holds is not tenant at will.

Rutledge v. White, 206 Ala. 329, 89 So. 599 (1921). Tenants at will, who are such by implication only, are still governed by the common law and are entitled to no more than reasonable notice to quit.

Bush v. Fuller, 173 Ala. 511, 55 So. 1000 (1911). A tenant at sufferance is not entitled to notice to quit, or at least to more than is sufficient to enable him to vacate the premises.

REAL ESTATE ACTIONS

APJI 22.43C

West's Key Number Digest, Landlord and Tenant ¶5, 700-901, 954, 956, 957, 1474, 1478.

1 Tiffany Real Property §§ 155 to 166, 173 (3rd ed. Sept. 2017).

1 Jesse P. Evans III, Alabama Property Rights and Remedies § 21.5[c][ii] p. 21-15 and 21-16 (5th ed. 2012).

Am. Jur. 2d, Landlord and Tenant §§ 110 to 124.

**APJI 22.44C TERMINATION OF POSSESSORY
INTEREST—TENANCY BY THE
MONTH—TEN-DAY NOTICE [PL]**

(Name of plaintiff) says a (month-to-month tenancy) (or, describe the tenancy for any term less than a year) existed between (him/her/it) and (name of defendant). (Name of plaintiff) says (he/she/it) terminated (name of defendant)'s possessory interest but (he/she/it) held over without a special agreement with (name of plaintiff).

(Name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That a (month-to-month tenancy) (tenancy for any term less than a year) existed between (him/her/it) and (name of defendant);

2. That (name of defendant) held over without a special agreement with (name of plaintiff);

3. That (name of plaintiff/name of plaintiff's agent) gave (name of defendant) a ten-day written notice to quit; and,

4. That (name of defendant) held over past the time in the notice.

If (name of plaintiff) proved all these things, you must find (he/she/it) terminated (name of defendant)'s possessory interest.

Approved March 9, 2018

Notes on Use

Use this instruction in unlawful detainer when the tenancy is by the month or for any term less than a year.

References

Ala. Code § 35-9-5 (1975) (West's Alabama Code).

McDevitt v. Lambert, 80 Ala. 536, 2 So. 438 (1887).

West's Key Number Digest, Landlord and Tenant ¶952, 696(3).

Am. Jur. 2d, Landlord and Tenant § 110 to 124.

**APJI 22.45C TERMINATION OF POSSESSORY
INTEREST—DEFAULT OF TERMS
OF THE LEASE—TEN-DAY
NOTICE [PL]**

(Name of plaintiff) says (he/she/it) leased (land/building) to (name of defendant) and (he/she/it) defaulted under the lease because (state the default). (Name of plaintiff) says (he/she/it) terminated (name of defendant)'s possessory interest, but (he/she/it) stayed in possession.

(Name of plaintiff) must reasonably satisfy you from the evidence:

1. That a lease existed between (name of plaintiff) and (name of defendant);
2. That (name of defendant) defaulted under the lease by (state the default);
3. That after the default, (name of plaintiff/name of plaintiff's agent) gave (name of defendant) a ten-day notice to quit; and,
4. That (name of defendant) stayed in possession of the (land/building) past the time in the notice.

If (name of plaintiff) proved all these things, you must find (he/she/it) terminated (name of defendant)'s possessory interest.

Approved March 9, 2018

Notes on Use

This instruction assumes the lease terms do not state how the plaintiff terminates the tenant's possessory interest.

When the lease provides for notice and re-entry, see, e.g., *Subway Real Estate Corp. v. Century Plaza Co.*, 624 So. 2d 1052 (Ala. 1993); *Lynaum Funeral Home, Inc. v. Hodge*, 576 So. 2d 169 (Ala. 1991).

References

Ala. Code § 6-6-310(2) (1975) (West's Alabama Code). 1996 Ala. Acts 573 amended § 6-6-310(2) and removed the requirement of a second ten-day demand for possession.

Ala. Code § 35-9-6 (1975) (West's Alabama Code) states in part: "When default is made in any of the terms of a lease, it shall not be necessary to give more than 10 days' notice to quit, or of the termination of such tenancy, and the same may be terminated on giving such notice to quit at any time after such default in any of the terms of such lease; which notice may be substantially in the following form:

To A.B.: You are hereby notified that in consequence of your default in (here insert the character of the default) of the premises now occupied by you, being (here describe the premises), I have elected to terminate your lease, and you are hereby notified to quit and deliver up possession of the same to me within 10 days of this date. Dated this. . . day of . . ."

Subway Real Estate Corp. v. Century Plaza Co., 624 So. 2d 1052 (Ala. 1993).

HealthSouth Rehabilitation Corp. v. Falcon Management Co., 799 So. 2d 177 (Ala. 2001).

Lynaum Funeral Home, Inc. v. Hodge, 576 So. 2d 169 (Ala. 1991).

See Hicks v. Longfellow Development Co., Inc., 362 So. 2d 219 (Ala. 1978) (Sanderson Act case) Default means one that justifies termination of the tenant's possessory right under the contract.

Mooney v. Weaver, 262 Ala. 392, 79 So. 2d 3 (1955). In the absence of a provision to such effect, the nonpayment of rent does not give the lessor right to terminate a lease.

Hackney v. Griffin, 244 Ala. 360, 13 So. 2d 772 (1943). The burden of proof is on the landlord. If the lease is parol and for a longer period than one year, it is void under statute of frauds unless the tenant is in possession and the landlord has accepted rents.

Johnson v. Blocton-Cahaba Coal Co., 205 Ala. 373, 87 So. 559 (1921).

APJI 22.45C**ALABAMA PATTERN JURY INSTRUCTIONS**

Arlen Realty, Inc. v. Dozier, 393 So. 2d 489 (Ala. Civ. App. 1980).

West's Key Number Digest, Landlord and Tenant ¶1536.

Am. Jur. 2d, Landlord and Tenant § 110 to 124, 640.

**APJI 22.46C DAMAGES—COMPENSATORY
[PL]**

If (name of plaintiff) proved to your reasonable satisfaction from the evidence that (name of defendant)'s conduct caused (name of plaintiff) harm, you should award (him/her/it) money damages.

Compensatory damages are awarded to (name of plaintiff) to fairly and reasonably compensate for the harm caused by (name of defendant)'s conduct.

Approved March 9, 2018

Notes on Use

Use this introductory instruction in forcible entry and detainer and unlawful detainer.

References

Ala. Code §§ 6-6-314, 6-6-337, 6-6-351 (1975) (West's Alabama Code).

West's Key Number Digest, Forcible Entry and Detainer ⇨30.

West's Key Number Digest, Landlord and Tenant ⇨1806.

Jenelle Mims Marsh, Alabama Law of Damages §§ 28:16, 36:31 (6th ed. 2012).

Am. Jur. 2d, Landlord and Tenant §§ 277 to 279.

APJI 22.47C DAMAGES—DETENTION [PL]

You may award damages for detention to fairly and reasonably compensate (name of plaintiff) for (his/her/its) loss of use and occupation of (his/her/its) (land/building).

These damages are money compensation to (name of plaintiff) for (name of defendant)’s unlawful use and occupation of the (land/building).

Approved March 9, 2018

Notes on Use

Use this instruction in forcible entry and detainer, peaceable entry and detainer, or unlawful detainer. Give APJI 22.46C first.

Give only APJI 22.48C in an unlawful detainer action when the plaintiff claims double the amount of annual rent.

When there is a disputed question of fact concerning if and when the lease ended, this raises the question of what is the appropriate measure of damages—damages for detention or damages for double the amount of annual rent. In this situation, give APJI 22.46C, this instruction, and APJI 22.48C.

References

Spear v. Lomax, 42 Ala. 576, 1868 WL 621 (1868).

Cf *Ex parte Krasner*, 249 Ala. 640, 32 So. 2d 678 (1947) (municipal court awarded damages for detention of tenements).

See *Speer v. Lancaster-Johnson Lumber Co.*, 214 Ala. 688, 108 So. 746 (1925) (jury must determine the value of rents that accrued pending appeal to the circuit court).

See *Renasant Bank v. Clark*, 203 So. 3d 866 (Ala. Civ. App. 2016) (In an ejectment action the plaintiff is entitled to recover the fair rental value of the property during the defendant’s unlawful possession).

West’s Key Number Digest, Landlord and Tenant ☞1806.

1 Jesse P. Evans III, *Alabama Property Rights and Remedies* §§ 21.9[b], 21.9[d] (5th ed. 2012).

Am. Jur. 2d, Landlord and Tenant §§ 277, 278.

**APJI 22.48C DAMAGES—DOUBLE ANNUAL
RENT AND SPECIAL DAMAGES
[PL]**

(Name of defendant) must pay damages equal to twice the yearly rent if you are reasonably satisfied from the evidence:

1. That a lease existed between (name of plaintiff) and (name of defendant);
2. That (name of defendant) forcibly or unlawfully stayed in possession after the lease expired;
3. That (name of plaintiff/agent/representative) gave (name of defendant) a ten-day written demand that (he/she/it) surrender possession; and,
4. That (name of defendant) refused to surrender possession.

If (name of plaintiff) proved all these things, you should award (him/her/it) an amount that is double the yearly rent (name of defendant) agreed to pay.

(If (name of plaintiff) proved all these things, you should award (him/her/it) any special damages caused by (name of defendant)'s conduct. (Name of plaintiff) asks you award special damages for (state the damages).)

Approved March 9, 2018

Notes on Use

Ala. Code § 6-6-314 (1975) (West's Alabama Code) is "highly penal in nature, [and it] must be construed strictly according to its terms." *Speer v. Lancaster-Johnson Lumber Co.*, 214 Ala. 688, 690, 108 So. 746, 748 (1925).

References

Ala. Code § 6-6-314 (1975) (West's Alabama Code) states: "Any

person who, having entered into the possession of lands and tenements under a contract of lease, forcibly or unlawfully retains the possession thereof after the expiration of his term or refuses to surrender the same on the written demand of the lessor, his agent, or attorney or legal representative, is liable for double the amount of the annual rent agreed to be paid under such contract and for such other special damages as may be thereby sustained by the party thus unlawfully kept out of possession, to be recovered as now provided by law in actions of unlawful detainer or by a civil action for damages.”

Collins v. Collins, 253 Ala. 288, 44 So. 2d 756 (1950).

Jones v. Duncan, 250 Ala. 587, 35 So. 2d 345 (1948).

H.G. Hill Co. v. Taylor, 234 Ala. 282, 174 So. 481 (1937).

Fisk Tire Co. v. Hunter, 221 Ala. 576, 130 So. 85 (1930).

Speer v. Lancaster-Johnson Lumber Co., 214 Ala. 688, 108 So. 746 (1925).

Cleveland v. Little Cahaba Coal Co., 205 Ala. 369, 87 So. 567 (1921).

Dillard v. Johnson, 201 Ala. 634, 79 So. 106 (1918).

Vizard Inv. Co. v. Mobile Fish & Oyster Co., 197 Ala. 625, 73 So. 328 (1916).

Ullman v. Herzberg, 91 Ala. 458, 8 So. 408 (1890).

West's Key Number Digest, Landlord and Tenant ⇐144, 1597, 1782.

Jenelle Mims Marsh, Alabama Law of Damages §§ 2:2, 36:31 (6th ed. 2012).

Am. Jur. 2d, Landlord and Tenant § 280.

**APJI 22.49C DAMAGES—VALUE OF RENT
PENDING APPEAL [PL]**

If you award (name of plaintiff) damages for rent and detention, then you must determine the monthly value of the rent and detention going forward.

Approved March 9, 2018

Notes on Use

Use this instruction in forcible entry and detainer or unlawful detainer when the plaintiff offers evidence about damages for rent or detention should the defendant appeal.

References

Ala. Code § 6-6-353 (1975) (West's Alabama Code) states: "In cases of forcible entry or unlawful detainer, the judgment, if against the appellant, must be entered in the circuit court against him and the sureties on the appeal or certiorari bond, including the costs in the inferior and circuit courts, and if the appeal or certiorari was sued out by the defendant and a supersedeas bond was executed, a writ of restitution or possession must be awarded and judgment must also be entered against the defendant and the sureties on his supersedeas bond for the value of the rent of the premises pending the appeal."

Ex parte Krasner, 249 Ala. 640, 32 So. 2d 678 (1947).

Speer v. Lancaster-Johnson Lumber Co., 214 Ala. 688, 108 So. 746 (1925).

Crocker v. Goldstein, 209 Ala. 172, 95 So. 873 (1923).

Harris v. Harris, 190 Ala. 619, 67 So. 465 (1914).

Giddens v. Bolling, 92 Ala. 586, 9 So. 274 (1891).

Jenelle Mims Marsh, Alabama Law of Damages § 36:31 (6th ed. 2012).

APJI 22.50C STATUTE OF LIMITATIONS [PL]

The law requires that (name of plaintiff) must have sued within three years from when (name of defendant) first occupied the (land/building).

(Name of defendant) says (name of plaintiff) must have sued by (date) because (state the defendant's reasons). This lawsuit was filed (date).

(Name of defendant) must reasonably satisfy you from the evidence:

1. That (he/she/it) occupied the (land/building) uninterrupted for three years before (name of plaintiff) sued; and,

2. That (name of defendant)'s estate was not established.

If (name of defendant) proved these things, you must find for (him/her/it).

Approved March 9, 2018

Notes on Use

The defendant must prove three elements:

1. The defendant claims an estate or interest in the premises;
2. Continuance of the estate undetermined; and,
3. Uninterrupted occupation under that claim for three years.

King v. Bolling, 77 Ala. 594, 1884 WL 740 (1884).

One way a defendant's estate is established is the defendant attorns to the plaintiff. Attornment occurs when the person who occupies land recognizes the plaintiff as his or her landlord. *Barnewell v. Stephens*, 142 Ala. 609, 38 So. 662 (1905); *Anderson v. Anderson*, 104 Ala. 428, 16 So. 14 (1894). See generally 1 Tiffany Real Property § 75 (3rd ed. Sept. 2017).

References

Ala. Code § 6-6-315 (1975) (West's Alabama Code) states: "The uninterrupted occupation of the premises in controversy by the defendant for the space of three entire years preceding the filing of the complaint is, if the estate of the defendant is not determined, a bar to any proceeding under this article."

Lipscomb v. Moore, 228 Ala. 365, 153 So. 393 (1934).

Barnewell v. Stephens, 142 Ala. 609, 38 So. 662 (1905).

Barefoot v. Wall, 108 Ala. 327, 18 So. 823 (1895).

King v. Bolling, 77 Ala. 594, 1884 WL 740 (1884).

Posey v. Pressley, 60 Ala. 243, 1877 WL 1422 (1877).

West's Key Number Digest, Forcible Entry and Detainer ☞17, 34.

1 Tiffany Real Property § 75 (3rd ed. Sept. 2017).

APJI 22.51C to 22.54C**Reserved**

USE AND OCCUPATION [PL]

APJI 22.55D USE AND OCCUPATION [PL]

READ NOTES ON USE

Ala. Code § 35-9-100 (1975) (West's Alabama Code) states:

“A reasonable satisfaction may be recovered for the use and occupation of land:

(1) When there has been a demise by deed or by parol, and no specific sum agreed on as rent.

(2) When the defendant has been let into possession upon a supposed sale of the lands, which, from the act of the defendant, has not been consummated.

(3) When the tenant remains on the land by sufferance of the owner. When, after a demise, the tenant, having had 30 days' previous notice, holds over without the consent of his landlord, he shall pay to such landlord double the value of the customary rent of the property so withheld.

(4) When the defendant has gone in possession of the land unlawfully. The owner of the land has a lien upon the same property of the defendant, and to the same extent as the landlord has under Section 35-9-30 or Section 35-9-60, which may be enforced by attachment as provided in Section 35-9-61 or Section 35-9-34, as may be applicable.

(5) When for any reason the defendant is estopped from disputing the title of the plaintiff as to the use of the land occupied. In no case shall a mere claim or assertion of powers, right or title of the defendant to that of the plaintiff be a defense unless the claim of right or title of the defendant is bona fide.”

Approved April 6, 2018

Notes on Use

In an action for use and occupation the plaintiff, an owner, landlord, or person rightfully in possession of real property, attempts to recover a reasonable satisfaction for the use and occupation of his land by the defendant. The reasonable satisfaction is essentially the rental value for the property. *Bates v. Bank of Moulton*, 226 Ala. 679, 148 So. 150 (1933).

APJI 22.55D quotes the statute and is only intended to acquaint the user with the five grounds for an action for use and occupation. APJI 22.56D through 22.60D state instructions for each category listed in the statute.

Actions brought under the first three subsections require an express or implied contract between the parties that estops the defendant from contesting the owner's title to the premises. *Alabama Butane Gas Co. v. Tarrant Land Co.*, 244 Ala. 638, 645, 15 So. 2d 105, 110 (1943). The plaintiff could bring the action under the fourth subsection if the defendant came into possession unlawfully. *Id.* at 244 Ala. 644, 15 So. 2d 110. The fifth subsection "broadens the scope of the estoppel which prior decisions had limited to the relation founded on an express or implied contract." *Faust v. Paramore*, 282 Ala. 20, 24, 208 So. 2d 589, 592 (1968).

The action is purely statutory, and it was unknown at common law. *Dow T. Huskey & Stephen T. Etheredge, Landlord and Tenant Breach and Remedies* § 2-12 (The Harrison Co. 1981); 1 *Jesse P. Evans III, Alabama Property Rights and Remedies* § 21.3 (5th ed. 2012); 3 *Tiffany Real Property* § 914 (3rd ed. Sept. 2017).

References

Ala. Code § 35-9-100 (1975) (West's Alabama Code).

Alabama Butane Gas Co. v. Tarrant Land Co., 244 Ala. 638, 15 So. 2d 105 (1943).

Bates v. Bank of Moulton, 226 Ala. 679, 148 So. 150 (1933).

Davis v. Reed, 211 Ala. 207, 100 So. 226 (1924).

Smith's Ex'rs v. Houston, 16 Ala. 111, 1849 WL 418 (1849).

West's Key Number Digest, Use and Occupation ☞1.

C.J.S., Use and Occupation § 1 (1955).

**APJI 22.56D DEMISE BY DEED OR PAROL—
ALA. CODE § 35-9-100(1) (1975)
(WEST’S ALABAMA CODE) [PL]**

Plaintiff (name of plaintiff) sues defendant (name of defendant) for rent. (Name of plaintiff) says (name of defendant) used and occupied (name of plaintiff)’s (land/building) from (date) to (date), but paid no rent.

(Name of plaintiff) says (he/she/it) and (name of defendant) had a (written/oral) agreement that (name of defendant) would use and occupy (name of plaintiff)’s (land/building). (Name of plaintiff) says they did not agree on an amount (name of defendant) would pay as rent.

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) and (name of defendant) agreed (name of defendant) would use and occupy (name of plaintiff)’s (land/building);
2. That (name of plaintiff) and (name of defendant) did not agree upon the amount (name of defendant) would pay as rent;
3. That (name of defendant) used and occupied (name of plaintiff)’s (land/building); and,
4. That (name of defendant)’s use and occupation harmed (name of plaintiff).

If (name of plaintiff) proved these things, you must find for (him/her/it). Then, you must award (name of plaintiff) a reasonable amount for (name of defendant)’s use and occupation of the (land/building).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved April 6, 2018

Notes on Use

Use this instruction only in an action for use and occupation under Ala. Code § 35-9-100(1) (1975) (West's Alabama Code).

References

East v. Tingley, 254 Ala. 309, 48 So. 2d 316 (1950).

Jones v. Scott, 249 Ala. 336, 31 So. 2d 361 (1947).

Bates v. Bank of Moulton, 226 Ala. 679, 148 So. 150 (1933).
The trial judge instructed that the jury “may call [the value of the use and occupation] rent if you want to, . . .”

Grady v. Ibach, 94 Ala. 152, 10 So. 287 (1891).

Davidson v. Ernest, 7 Ala. 817, 1845 WL 159 (1845).

Mozley v. Boen, 41 Ala. App. 596, 143 So. 2d 304 (1962).

Thomas v. Smoot, 2 Ala. App. 407, 56 So. 1 (1911).

West's Key Number Digest, Mortgages and Deeds of Trust
☞53.

West's Key Number Digest, Implied and Constructive Contracts
☞1, 7, 58, 72, 121.

3 Tiffany Real Property § 914 (3rd ed. Sept. 2017).

1 Jesse P. Evans III, Alabama Property Rights and Remedies
§ 21.3 (5th ed. 2012).

Dow T. Huskey & Stephen T. Etheredge, Landlord and Tenant
Breach and Remedies § 2-12 (The Harrison Co. 1981).

C.J.S., Demise 176 (1956).

Black's Law Dictionary 443 (7th ed. 1999).

**APJI 22.57D DEFENDANT LET INTO
POSSESSION—ALA. CODE § 35-9-
100(2) (1975) (WEST’S ALABAMA
CODE) [PL]**

Plaintiff (name of plaintiff) says (he/she/it) and defendant (name of defendant) entered into a contract (describe the contract of sale and purchase). (Name of plaintiff) says (name of defendant) did not complete the contract because (state the claimed breach).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) agreed to sell and (name of defendant) agreed to buy the (land/building);
2. That (name of defendant) took possession of the (land/building);
3. That (name of defendant) breached the agreement;
4. That (name of defendant) used and occupied the (land/building); and,
5. That (name of defendant)’s use and occupation harmed (name of plaintiff).

If (name of plaintiff) proved these things, you must find for (him/her/it). Then, you must award (name of plaintiff) a reasonable amount for (name of defendant)’s use and occupation of the (land/building).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved April 6, 2018

Notes on Use

Use this instruction only in action for use and occupation under Ala. Code § 35-9-100(2) (1975) (West’s Alabama Code).

When the defendant takes possession under an executory contract, and the contract has a valid liquidated damages provision, that provision controls the extent of the vendor's damages. *Lobman v. Sawyer*, 37 Ala. App. 582, 74 So. 2d 502 (1954), cert. denied, 261 Ala. 699, 74 So. 2d 505 (1954).

See Contracts, 1 APJI 10.00 to 10.13 (3rd ed.).

References

Lobman v. Sawyer, 37 Ala. App. 582, 74 So. 2d 502 (1954), cert den, 261 Ala 699, 74 So. 2d 505 (1954) (Memo).

West's Key Number Digest, Damages ⇨75, 81.

West's Key Number Digest, Implied and Constructive Contracts ⇨7, 58.

West's Key Number Digest, Vendor and Purchaser ⇨191, 192, 330.

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 33:5 p. 767 n. 8, 34:5 (6th ed. 2012).

3 Tiffany Real Property § 914 (3rd ed. Sept. 2017).

1 Jesse P. Evans III, *Alabama Property Rights and Remedies* § 21.3 (5th ed. 2012).

Dow T. Huskey & Stephen T. Etheredge, *Landlord and Tenant Breach and Remedies* § 2-12 (The Harrison Co. 1981).

**APJI 22.58D TENANT AT SUFFERANCE—ALA.
CODE § 35-9-100(3) (1975) (WEST'S
ALABAMA CODE) [PL]**

Plaintiff (name of plaintiff) says (he/she/it) had an agreement with defendant (name of defendant) that (name of defendant) would use and occupy the (land/building) to (insert date). (Name of defendant) remained (on/in) the (land/building) after (his/her/its) right to use and occupancy ended. (Name of plaintiff) sues (name of defendant) for rent from (insert dates).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) and (name of defendant) agreed (name of defendant) would use and occupy (name of plaintiff)'s (land/building);
2. That (name of defendant) remained (on/in) the (land/building) after (his/her/its) right to use and occupancy ended;
3. That (name of defendant) continued to use and occupy (name of plaintiff)'s (land/building) without (name of plaintiff)'s assent or dissent; and,
4. That (name of defendant)'s continued use and occupancy harmed (name of plaintiff).

If (name of plaintiff) proved these things, you must find for (him/her/it). Then, you must award (name of plaintiff) a reasonable amount for (name of defendant)'s use and occupation of the (land/building).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved April 6, 2018

Notes on Use

Use this instruction when the plaintiff did not give the defendant thirty days notice to quit. When the plaintiff gave the defendant thirty days notice, and the plaintiff seeks double the customary rent, use APJI 22.62D.

References

See *East v. Tingley*, 254 Ala. 309, 48 So. 2d 316 (1950) (unlawful detainer of apartment).

Miller v. Faust, 248 Ala. 268, 26 So. 2d 908 (1946).

Buchmann v. Callahan, 222 Ala. 240, 131 So. 799 (1930).

West's Key Number Digest, Landlord and Tenant ⚙708, 709.

West's Key Number Digest, Mortgages and Deeds of Trust ⚙2052, 2058.

**APJI 22.59D UNLAWFUL POSSESSION—ALA.
CODE § 35-9-100(4) (1975) (WEST'S
ALABAMA CODE) [PL]**

Plaintiff (name of plaintiff) sues defendant (name of defendant) for rent.

(Name of plaintiff) says (name of defendant) unlawfully entered (name of plaintiff)'s (land/building). (He/she/it) says (name of defendant) used and occupied the (land/building), but paid no rent.

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (name of defendant) unlawfully went into possession of (name of plaintiff)'s (land/building);
2. That (name of defendant) used and occupied (name of plaintiff)'s (land/building); and,
3. That (name of defendant)'s use and occupation harmed (name of plaintiff).

Unlawfully means (name of defendant) intruded onto (name of plaintiff)'s possession, and (name of defendant) did this without a bona fide claim of title to the (land/building).

If (name of plaintiff) proved these things, you must find for (him/her/it). Then, you must award (name of plaintiff) a reasonable amount for (name of defendant)'s use and occupation of the (land/building).

If (name of plaintiff) did not prove these things, you must find for (name of defendant).

Approved April 6, 2018

Notes on Use

Use this instruction only in actions for use and occupation under Ala. Code § 35-9-100(4) (1975) (West's Alabama Code).

The owner of the land has a lien upon the same property of the defendant, and to the same extent as the landlord has under § 35-9-30 or § 35-9-60, which may be enforced by attachment as provided in § 35-9-61 or § 34-9-34, as may be applicable.

APJI 22.27B, Actual Possession—Defined.

APJI 22.26B, Peaceable Possession—Defined.

References


Ala. Code § 35-9-100(4) (West's Alabama Code).

Jones v. Scott, 249 Ala. 336, 31 So. 2d 361 (1947).

Alexander v. Letson, 242 Ala. 488, 7 So. 2d 33 (1942).

Kay v. Adams, 223 Ala. 33, 134 So. 628 (1931). A plaintiff cannot recover for use and occupancy against a defendant in adverse possession under color of title.

Crabtree v. Street, 200 Ala. 442, 76 So. 374 (1917). The trial court erred when it gave the affirmative instruction for the defendant, but the evidence was in conflict about whether the plaintiff was in peaceable possession.

West's Key Number Digest, Implied and Constructive Contracts  7, 72.

Black's Law Dictionary 570 (7th ed. 1999).

APJI 22.60D ESTOPPEL—ALA. CODE § 35-9-100(5) (1975) (WEST'S ALABAMA CODE) [PL]

Plaintiff (name of plaintiff) sues (name of defendant) to recover for defendant (name of defendant)'s use and occupancy of (name of plaintiff)'s (land/building).

(Name of defendant) says (state the defense).

In response, (name of plaintiff) says (name of defendant) is estopped from raising this defense because (state plaintiff's contention).

Estoppel means (name of defendant) is barred from disputing (name of plaintiff)'s title.

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (name of defendant) is barred from disputing (name of plaintiff)'s title;
2. That (name of defendant) used and occupied (name of plaintiff)'s (land/building); and,
3. That (name of defendant)'s use and occupancy harmed (name of plaintiff).

If (name of plaintiff) proved all these things, you must find for (him/her/it). Then, you must award (name of plaintiff) a reasonable amount for (name of defendant)'s use and occupation of the (land/building).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved April 6, 2018

Notes on Use

The committee does not attempt to state the various circumstances when estoppel may arise.

“In no case, shall a mere claim or assertion of powers, right or title of the defendant to that of the plaintiff be a defense unless the claim of right or title of the defendant is bona fide.” Ala. Code § 35-9-100(5) (1975) (West’s Alabama Code).

References

Humphrey v. Boschung, 287 Ala. 600, 253 So. 2d 769 (1971).

Faust v. Paramore, 282 Ala. 20, 208 So. 2d 589 (1968).

City of Montgomery v. Weldon, 280 Ala. 463, 195 So. 2d 110 (1967).

First Nat. Bank v. Welch, 222 Ala. 144, 132 So. 44 (1930).

West’s Key Number Digest, Implied and Constructive Contracts ☞7.

APJI 22.61D ANSWER—DEFENSES [PL]

(Name of defendant) says (name of plaintiff) cannot recover because (state the defense).

Approved April 6, 2018

Notes on Use

The cases referenced do not represent an inclusive list of defenses.

References

Faust v. Paramore, 282 Ala. 20, 208 So. 2d 589 (1968).

Jones v. Scott, 249 Ala. 336, 31 So. 2d 361 (1947).

Miller v. Faust, 248 Ala. 268, 26 So. 2d 908 (1946).

Alexander v. Letson, 242 Ala. 488, 7 So. 2d 33 (1942).

Veazey v. Electrical Research Products, 226 Ala. 60, 145 So. 319 (1932).

Kay v. Adams, 223 Ala. 33, 134 So. 628 (1931).

Pheland v. Candee, 105 Ala. 235, 16 So. 696 (1894).

Grady v. Ibach, 94 Ala. 152, 10 So. 287 (1891).

Weaver v. Jones, 24 Ala. 420, 1854 WL 413 (1854).

Simmons v. McClendon, 34 Ala. App. 369, 39 So. 2d 787 (1949).

Belcher v. Birmingham Trust Nat. Bank, 348 F. Supp. 61 (N.D. Ala. 1968).

West's Key Number Digest, Implied and Constructive Contracts ☞7, 50, 58.

West's Key Number Digest, Vendor and Purchaser ☞124, 126.

West's Key Number Digest, Mortgages and Deeds of Trust ☞2055(1).

APJI 22.62D DAMAGES—GENERAL [PL]

The measure of damages for (name of defendant)'s use and occupation of the (land/building) is its fair and reasonable rental value.

Approved April 6, 2018

Notes on Use

Use this instruction except when the plaintiff claims double the customary rent under § 35-9-100(3). Use APJI 22.63D when the plaintiff seeks double rent.

When the defendant takes possession under an executory contract, and the contract has a valid liquidated damages provision, that provision controls the extent of the vendor's damages. *Lobman v. Sawyer*, 37 Ala. App. 582, 74 So. 2d 502 (1954), cert. denied, 261 Ala 699, 74 So. 2d 505 (1954).

References

Cf *White Roofing Co. v. Wheeler*, 39 Ala. App. 662, 666, 106 So. 2d 658, 662 (1957) (claims for breach of repair contract and torts). "Rent is the consideration paid for the use of land."

Miller v. Faust, 248 Ala. 268, 269, 26 So. 2d 908, 909 (1946).

Kay v. Adams, 223 Ala. 33, 134 So. 628 (1931).

Grady v. Ibach, 94 Ala. 152, 154, 10 So. 287, 288 (1891).

Smith's Ex'rs v. Houston, 16 Ala. 111, 1849 WL 418 (1849).

Lobman v. Sawyer, 37 Ala. App. 582, 74 So. 2d 502 (1954), cert. denied, 261 Ala 699, 74 So. 2d 505 (1954).

West's Key Number Digest, Damages ☞75, 81.

West's Key Number Digest, Implied and Constructive Contracts ☞7, 58.

West's Key Number Digest, Landlord and Tenant ☞1420.

West's Key Number Digest, Vendor and Purchaser ☞191, 192, 330.

APJI 22.62D**ALABAMA PATTERN JURY INSTRUCTIONS**

Jenelle Mims Marsh, *Alabama Law of Damages* § 34:5 (6th ed. 2012).

3 Tiffany Real Property §§ 179, 876 (Sept. 2017).

Am. Jur. 2d, *Landlord and Tenant* §§ 546, 547, 548.

**APJI 22.63D DAMAGES—DOUBLE VALUE OF
CUSTOMARY RENT [PL]**

Plaintiff (name of plaintiff) says (he/she/it) had an agreement with the defendant (name of defendant) that (name of defendant) would use and occupy the (land/building) to (insert date). (Name of plaintiff) further says (name of defendant) remained (on/in) the (land/building) after (his/her/its) right to use and occupancy ended.

(Name of plaintiff) says (he/she/it) gave (name of defendant) a thirty-day notice to leave the (land/building), but (name of defendant) continued to use and occupy the (land/building).

(Name of plaintiff) sues (name of defendant) for double the amount of customary rent from (insert dates).

To recover, Plaintiff (name of plaintiff) must prove to your reasonable satisfaction from the evidence:

1. That (name of plaintiff) and (name of defendant) agreed (name of defendant) would use and occupy (name of plaintiff)'s (land/building);
2. That (name of defendant) remained (on/in) the (land/building) after (his/her/its) right to use and occupancy ended;
3. That (name of defendant) continued to use and occupy (name of plaintiff)'s (land/building) without (name of plaintiff)'s assent or dissent;
4. That (name of plaintiff) then gave (name of defendant) thirty-day notice to leave the (land/building);
5. That (name of defendant) continued to use and occupy the (land/building) after the thirty days;
6. The customary rent for the (land/building); and,
7. That (name of defendant)'s continued use and occupancy harmed (name of plaintiff).

APJI 22.63D**ALABAMA PATTERN JURY INSTRUCTIONS**

If (name of plaintiff) proved these things, you must find for (him/her/it). Then, you must award (name of plaintiff) an amount twice the customary rent for the (land/building).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved April 6, 2018

Notes on Use

Use this instruction only when the plaintiff seeks double the value of the customary rent.

References

Ala. Code § 35-9-100 (3) (1975) (West's Alabama Code).

Dow T. Huskey & Stephen T. Etheredge, *Landlord and Tenant Breach and Remedies* § 2-1 (The Harrison Co. 1981).

APJI 22.64D to 22.66D**Reserved**

Chapter 23

Defamation (Libel and Slander) [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 23.00 Pretrial Introduction [PL]
- APJI 23.01 Defamation—Elements, Etc. [PL]
- APJI 23.02 Libel Per Quod and Slander Per Quod—Elements [PL]
- APJI 23.03 Fault Private Person/Public Concern—Public Official/Public Figure—Limited-Purpose Public Figure [PL]
- APJI 23.04 Corporate Responsibility for Libel and Slander [PL]
- APJI 23.05 Absolute Privilege [PL]
- APJI 23.06 Qualified Privilege [PL]
- APJI 23.07 Truth—Affirmative Defense [PL]
- APJI 23.08 to 23.09 Reserved
- APJI 23.10 Compensatory Damages—Actual Harm (Libel/ Slander Per Se) [PL]
- APJI 23.11 Presumed Compensatory Damages—Libel Per Se or Slander Per Se [PL]
- APJI 23.12 Nominal Damages—Libel Per Se or Slander Per Se [PL]
- APJI 23.13 Mitigation—Retraction [PL]
- APJI 23.14 Actual Damages—Retraction Within Ten Days of Publication [PL]
- APJI 23.15 Punitive Damages—Slander—Private Person and Matter of Purely Private Concern [PL]
- APJI 23.16 Punitive Damages—Slander—Public Figure, Limited-Purpose Public Figure, Public Official [PL]
- APJI 23.17 Punitive Damages—Libel—Private Person/Private Concern (New) [PL]
- APJI 23.18 Punitive Damages—Libel—Private Person/Public Concern or Public Figure, Etc. [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Date Approved	Prior Instruction Number
23.00 Pretrial Introduction [PL]	7/10/15	New
23.01 Defamation—Elements, Etc. [PL]	7/10/15	23.00, 23.01, 23.02, 23.03, 23.04, 23.05, 23.06, 23.07, 23.08, 23.09
23.02 Libel Per Quod and Slander Per Quod—Elements [PL]	9/11/15	New
23.03 Fault—Private Person/Public Concern—Public Official/Public Figure—Limited-Purpose Public Figure [PL]	7/10/15	23.10
23.04 Corporate Responsibility for Libel and Slander [PL]	9/11/15	23.11
23.05 Absolute Privilege [PL]	7/10/15	23.12
23.06 Qualified Privilege [PL]	7/10/15	23.13
23.07 Truth—Affirmative Defense [PL]	11/6/15	New
23.08–23.09 Reserved		
23.10 Compensatory Damages—Actual Harm (Libel/Slander Per Se) [PL]	9/11/15	23.14, 23.15
23.11 Presumed Compensatory Damages—Libel Per Se or Slander Per Se [PL]	9/11/15	23.17, 23.18
23.12 Nominal Damages—Libel Per Se or Slander Per Se [PL]	11/6/15	23.16
23.13 Mitigation—Retraction [PL]	11/6/15	23.26
23.14 Actual Damages—Retraction Within Ten Days of Publication [PL]	11/6/15	23.22, 23.26
23.15 Punitive Damages—Slander—Private Person and Matter of Purely Private Concern [PL]	11/6/15	23.25
23.16 Punitive Damages—Slander—Public Figure, Limited-Purpose Public Figure, Public Official [PL]	11/6/15	23.23

DEFAMATION (LIBEL AND SLANDER)

Title of Instruction	Date Approved	Prior Instruction Number
23.17 Punitive Damages—Libel— Private Person/Private Concern (New) [PL]	11/6/15	NEW
23.18 Punitive Damages—Libel— Private Person/Public Concern or Public Figure, Etc. [PL]	11/6/15	23.24
		23.19, 23.20, 23.21 (Deleted)

APJI 23.00 PRETRIAL INTRODUCTION [PL]

Plaintiff (name of plaintiff) sues defendant (name of defendant) for defamation.

Defamation takes two forms—libel or slander. Libel is the publication of something false by written or printed words or by pictures, signs or in some other physical form. Slander is publication of something false by spoken words or brief gestures. Defamation harms a person's reputation, or lowers (his/her/its) esteem in the community, or makes others not want to associate with (him/her/it).

(Name of plaintiff) says (name of defendant) published (specify the form of communication, e.g., newspaper article, radio or television broadcast, conversation, electronic media, other form of communication) about (name of plaintiff). (He/she/it) says (specify the statement, etc.) was false and it defamed (him/her/it) because (state how plaintiff claims it defamed him/her/it).

(Name of defendant) denies (he/she/it) defamed (name of plaintiff) because:

(The communication is not defamatory).

(The communication was not published).

(The communication was a statement of opinion and not fact).

(The communication was protected by an (absolute/qualified) privilege).

(The communication was substantially true).

((Name of plaintiff) consented to the communication).

A person publishes something when (he/she/it) communicates it to a third person. The word publication can mean speaking to a third person, or showing a picture, or posting a sign, or any other form of communication.

Approved July 10, 2015

Amended November 6, 2015

Notes on Use

Use this instruction to introduce the issues before trial and to give the jury an overview of the law of defamation.

The elements of a claim for defamation are stated in *McCaig v. Talladega Pub. Co., Inc.*, 544 So. 2d 875, 877 (Ala. 1989), citing Restatement (Second) of Torts § 558 (1977):

1. A false and defamatory statement concerning the plaintiff;
2. An unprivileged communication of that statement to a third party;
3. Fault amounting at least to negligence on the part of the defendant; and,
4. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication of the statement.

These elements are stated in terms of the plaintiff's prima facie case in *Federal Credit, Inc. v. Fuller*, 72 So. 3d 5, 9 (Ala. 2011).

References

The following is not an exhaustive list of references. The Committee suggests the opinion in *Cottrell v. National Collegiate Athletic Ass'n*, 975 So. 2d 306, 230 Ed. Law Rep. 899 (Ala. 2007) is an excellent primer on the law of defamation.

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964) and its progeny.

Butler v. Town of Argo, 871 So. 2d 1, 5 (Ala. 2003).

West's Key Number Digest, Libel and Slander ⇨1 et seq.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 24.01 to 24.17 (5th ed. 2010).

APJI 23.00**ALABAMA PATTERN JURY INSTRUCTIONS**

Jennelle Mims Marsh, Alabama Law of Damages §§ 2:2, 36:26 to 36:28 (6th ed. 2012).

1 Ally W. Howell, Alabama Personal Injury and Torts § 12:25 (2012).

Rodney A. Smolla, Law of Defamation §§ 1 et. seq. (May, 2015).

Am. Jur. 2d, Libel and Slander §§ 1 et seq.

Ala. Code § 12-21-142 (1975) (West's Alabama Code). Reporter shield law.

**APJI 23.01 DEFAMATION—ELEMENTS, ETC.
[PL]**

(Name of plaintiff) sues (name of defendant) for defamation. (Name of plaintiff) says (name of defendant) published (specify the form of communication, e.g., newspaper article, radio or television broadcast, conversation, electronic media, other form of communication) about (name of plaintiff). (He/she/it) says (specify the statement, etc.) was false and it defamed (him/her/it) because (state why plaintiff claims it was defamatory).

(Name of defendant) denies (he/she/it) defamed (name of plaintiff) because:

(The communication is not defamatory).

(The communication was not published).

(The communication was a statement of opinion and not fact).

(The communication was protected by an (absolute/qualified) privilege).

(The communication was substantially true).

((Name of plaintiff) consented to the communication).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence, all of the following:

1. That (name of defendant) made a false statement about (name of plaintiff);
2. The statement was defamatory;
3. That (name of defendant) published the statement to another person; and,
4. (Name of defendant) published the statement (negligently/wantonly /intentionally).

If (name of plaintiff) proved all these things, you must find for (him/her/it) and then you must determine how much money to award (name of plaintiff).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

False Statement About the Plaintiff.

The statement must be a false statement, and it must (be about/refer to) (name of plaintiff). The statement can identify (him/her/it) by name or in a way that a reasonable person would identify (name of plaintiff) as the person the statement is about.

Group Defamation.

If the statement is about a group or a class of persons that (name of plaintiff) is a member of, you must determine if the statement refers to (name of plaintiff).

(Name of plaintiff) must prove to your reasonable satisfaction from the evidence that:

1. The group or class of people is so small that the statement can reasonably be understood to refer to (him/her/it); or,
2. The circumstances that surround the publication reasonably give rise to the conclusion that there is a particular reference to (name of plaintiff).

Defamatory Statement.

A statement is defamatory if it tends to harm the reputation of (name of plaintiff) and lower the community's judgment of (name of plaintiff)'s worth or character, or discourages others from associating with (him/her/it). A defamatory statement includes whatever tends to impute fraud, dishonesty, or reflect shame on (name of plaintiff).

You must determine whether, in fact, the (article/

broadcast/conversation, etc.) was defamatory. You will do this according to two rules.

1. You must review and interpret the (article/broadcast/conversation, etc.) in its entirety and in relation to the conception and opinion of the public at the time and in the community in which it (appeared/happened). You do not focus just on part of it.

2. You will give the (article/broadcast/conversation, etc.) its natural meaning, and according to the sense in which the statement appears to have been used and the idea it was meant to communicate to those who (read/saw/heard) it. It must be construed and determined by the natural and probable effect on the mind of the (average lay reader/average lay viewer/average lay listener).

You do not determine its effect when subjected to a critical analysis by a trained legal mind.

Publication and Republication.

(Name of defendant) published the statement if (he/she/it) communicated it to someone other than (name of plaintiff).

(Name of defendant) is usually not responsible if others republish or repeat (name of defendant)'s defamatory statement. But, if it was natural and probable that others would repeat or republish the statement then (name of defendant) is responsible.

(Name of defendant) is responsible if (he/she/it) repeats or republishes a defamatory statement unless (he/she/it) merely delivered or transmitted the statement.

Intrabusiness Publication.

The law is that when management personnel communicate statements (between/among) themselves about company business the statements are not published. When a manager makes a statement to a non-management employee

the statement is not published if the employee is acting within the proper scope of (his/her) knowledge and duties.

Negligence.

(Name of defendant) negligently published the statement if (he/she/it) did something that a reasonably prudent person would not have done in a similar situation, or (he/she/it) failed to do something a reasonably prudent person would have done in a similar situation.

When deciding whether (name of defendant) was negligent, you may consider:

1. The thoroughness of the check that a reasonable person would have made before publishing the statement;
2. The nature of the interests (name of defendant) sought to promote when (he/she/it) published the statement; and,
3. The extent of the harm the statement exposed (name of plaintiff)'s reputation to.

Approved July 10, 2015

Notes on Use

Use this instruction when the plaintiff is a private person and the claimed defamatory statement is a matter of private concern. Negligence is the minimum burden of proof and only applies when the plaintiff is a private person and the communication is of purely private concern. See, *Mead Corp. v. Hicks*, 448 So. 2d 308, 313 (Ala. 1983); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

Element 4 must be changed when the trial judge has determined that the statement has the protection of a qualified privilege. It must state:

4. (Name of defendant) published the statement with ill will or spite towards (name of plaintiff).

The first three elements of the instruction will be used in all defamation cases.

See, APJI 29.00, Wantonness Defined.

See, APJI 29.01, Willful Conduct.

References

See references in APJI 23.00.

Bell v. Smith, 281 So. 3d 1247 (Ala. 2019) (online article was a statement of opinion).

Poff v. Hayes, 763 So. 2d 234 (Ala. 2000). Republication.

Barnette v. Wilson, 706 So. 2d 1164 (Ala. 1997). Republication.

Tucker v. Salazar, 163 So. 3d 375 (Ala. Civ. App. 2014). Publication and intrabusiness publication.

**APJI 23.02 LIBEL PER QUOD AND SLANDER
PER QUOD—ELEMENTS [PL]**

(Name of plaintiff) sues (name of defendant) for defamation. (Name of plaintiff) says (name of defendant) published (specify the form of communication, e.g., newspaper article, radio or television broadcast, conversation, electronic media, other form of communication) about (name of plaintiff). (He/she/it) says (specify the statement, etc.) was false and it defamed (him/her/it) because (state why plaintiff claims it was defamatory).

(Name of defendant) says (state the defendant's contention(s)).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of defendant) made a false statement about (name of plaintiff);
2. That (name of defendant) published the statement to another person;
3. (Name of defendant) published the statement (negligently/wantonly/intentionally);

Libel

4. The statement was defamatory when considered in connection with facts generally known by the people who (read/saw/watched) the statement; and,

Slander

4. The statement exposed (name of plaintiff) to disgrace, ridicule, hatred or contempt; and,
5. The statement caused (name of plaintiff) economic harm. Economic harm is harm that can be measured in money.

If (name of plaintiff) proved all these things, you must find for (him/her/it) and then you must determine how much money to award (name of plaintiff).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Approved September 11, 2015

Notes on Use

Libel *per quod* is a statement that is defamatory only when considered with relevant extrinsic facts and it causes special damages. W. Page Keeton, et al, Prosser & Keeton on Torts § 112 pp. 793–95 (4th ed. 1984). Slander *per quod* exposes the plaintiff to disgrace, ridicule, odium or contempt but falls short of imputing commission of a crime or misdemeanor, and it causes special damages. Butler v. Town of Argo, 871 So. 2d 1, 18 (Ala. 2003).

When the claim is libel *per quod* or slander *per quod* the plaintiff must first prove direct economic damages as an element of the claim. In slander *per quod* plaintiff must prove the loss of some material or economic advantage that can be measured in money. Jenelle Mims Marsh, Alabama Law of Damages § 36:27 pp. 889–90 (6th ed. 2012). In libel *per quod* the plaintiff must prove economic harm such as loss of employment, income, or profit. Id. § 36:28 p. 893. If the plaintiff proves direct economic harm, other types or compensatory damages may be recovered because they are “parasitic” to the claim. W. Page Keeton, et al., Prosser & Keeton on Torts § 112 pp. 794–95 (5th ed. 1984).

References

Cottrell v. National Collegiate Athletic Ass’n, 975 So. 2d 306, 230 Ed. Law Rep. 899 (Ala. 2007).

Anderton v. Gentry, 577 So. 2d 1261 (Ala. 1991).

West’s Key Number Digest, Libel and Slander ¶100(2).

Jenelle Mims Marsh, Alabama Law of Damages §§ 36:27, 36:28 (6th ed. 2012).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.02, 24.03 (5th ed. 2010).

**APJI 23.03 FAULT PRIVATE PERSON/PUBLIC
CONCERN—PUBLIC OFFICIAL/
PUBLIC FIGURE—LIMITED-
PURPOSE PUBLIC FIGURE [PL]**

(Name of plaintiff) must prove by clear and convincing evidence that when (name of defendant) published the statement (he/she/it) knew the statement was false or (he/she/it) published it with reckless disregard to whether it was false or not.

(Name of defendant) acted with reckless disregard if, at the time (he/she/it) published the statement, (he/she/it) had a serious doubt that the statement was true, or (he/she/it) had a high degree of awareness that the statement was false. Thus, you have to determine (name of defendant)'s state of mind when (he/she/it) published the statement. (Name of plaintiff) must prove that (name of defendant) actually had a serious doubt that the statement was true.

To determine whether (name of defendant) acted with reckless disregard, you must not consider whether a reasonably prudent person would have published the statement. You must not consider whether a reasonably prudent person would have investigated before (he/she/it) published the statement. But, if (name of defendant) failed to investigate because (he/she/it) intended to avoid the truth, this is evidence that (name of defendant) either knew the statement was false or acted with reckless disregard to whether the statement was false or not.

Clear and convincing proof requires a degree of belief greater than proof to your reasonable satisfaction from the evidence. It is proof that establishes it is highly probable that when (name of defendant) published the statement (he/she/it) knew it was false or acted with reckless disregard to whether it was false or not.

Approved July 10, 2015

Amended November 6, 2015

Notes on Use

The court must determine the plaintiff's status as a matter of law. *Cottrell v. National Collegiate Athletic Ass'n*, 975 So. 2d 306, 332-33 (Ala. 2007).

References

St. Amant v. Thompson, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968).

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, (1964).

Cottrell v. National Collegiate Athletic Ass'n, 975 So. 2d 306, 230 Ed. Law Rep. 899 (Ala. 2007).

Deutch v. Birmingham Post Co., 603 So. 2d 910, 911 (Ala. 1992).

Pemberton v. Birmingham News Co., 482 So. 2d 257, 264 (Ala. 1985).

Mobile Press Register, Inc. v. Faulkner, 372 So. 2d 1282 (Ala. 1979), overruled on other grounds, *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1091 n.3 (Ala. 1988).

West's Key Number Digest, Libel and Slander ☞101, 123(8).

Ala. Code § 6-11-20(b)(4) (1975) (West's Alabama Code) (clear and convincing evidence defined).

Ally W. Howell, *Alabama Personal Injury and Torts* § 12:25 (2012).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 24.06 (5th ed. 2010).

**APJI 23.04 CORPORATE RESPONSIBILITY
FOR LIBEL AND SLANDER [PL]**

(Name of corporation) is responsible for (name of agent/servant/employee)'s (libel/slander) if (he/she) acted within the scope of (his/her) agency or employment. This is true even if (he/she) acted contrary to what (name of corporation) told (him/her) (to do/not to do).

Agent—Defined

(Name of claimed agent) is the agent of (name of defendant) if (he/she) agreed to act for (name of defendant) and (he/she) was controlled by (name of defendant). The agreement may be written, oral, or implied by their conduct. The agreement may be for pay or for no pay.

Servant/employee—Defined

(Name of servant/employee) is the (servant/employee) of (name of defendant) if (1) (name of defendant) had the right to select or did select (name of servant/employee) to do the (task/job); and (2) (name of defendant) had the right to control how (name of servant/employee) did the (task/job).

Scope of Agency or Employment

(Name of agent/servant/employee) acted within the scope of (his/her) employment or authority if:

1. (He/she) was doing an act (he/she) was (hired/asked) to perform or the act was closely related to what (he/she) was (hired/asked) to perform; or,

(His/her) conduct benefited (name of principal/master/employer); and,

2. (His/her) conduct was not based on a reason that was solely personal to (name of agent/servant/employee).

Approved September 11, 2015

Notes on Use

See APJI 3.05, Deviation From Instructions; APJI 3.06, Departure From Line and Scope; APJI 3.07, Deviation From Authority; and APJI 3.08, Ratification of Acts by Principal.

References

Pensacola Motor Sales, Inc. v. Daphne Automotive, LLC, 155 So. 3d 930 (Ala. 2013).

Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085 (Ala. 1988).

Cooper v. Alabama Farm Bureau Mut. Cas. Ins. Co., Inc., 385 So. 2d 630 (Ala. 1980).

West's Key Number Digest, Libel and Slander ⇨23.1.

West's Key Number Digest, Corporations and Business Organizations ⇨2373.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.14 (5th ed. 2010).

10 Fletcher Cyclopedia of the Law of Corporations § 4889 (September, 2015).

Am. Jur. 2d Libel and Slander §§ 340 to 346.

APJI 23.05 ABSOLUTE PRIVILEGE [PL]

(Name of defendant) says (state the communication) is protected by an absolute privilege and (name of plaintiff) cannot recover. (Name of defendant) says (he/she/it) published the communication during (state the proceeding or how the communication was made).

Alabama law is some statements that are published are protected by an absolute privilege. When the publication is absolutely protected, a person cannot recover even though it was false and done spitefully or with ill-will toward that person.

Approved July 10, 2015

Notes on Use

Use this instruction as an introductory instruction when the defendant pleads the communication is absolutely privileged and in the rare case when the jury must determine a question of fact that determines whether the absolute privilege applies. The Committee does not undertake to draft a proposed instruction for a specific fact situation.

The instruction published in the prior editions of this work is wrong to the extent the instruction states the communication loses its privilege if made with common-law malice. See APJI 23.12 (3d ed. 2015). The plaintiff cannot recover if the communication is protected by an absolute privilege. *Walker v. Majors*, 496 So. 2d 726 (Ala. 1986).

Alabama recognizes an absolute privilege in five circumstances: (1) communications made during the course of and which are relevant or pertinent to a judicial proceeding, *Barnett v. Mobile County Personnel Bd.*, 536 So. 2d 46 (Ala. 1988), *Walker v. Majors*, 496 So. 2d 726 (Ala. 1986), *O'Barr v. Feist*, 292 Ala. 440, 446, 296 So. 2d 152, 157 (1974), Restatement (Second) of Torts § 587 (1977); (2) communications made during quasi-judicial proceedings, *Webster v. Byrd*, 494 So. 2d 31, 34 Ed. Law Rep. 1290 (Ala. 1986), *Sullivan v. Smith*, 925 So. 2d 972 (Ala. Civ. App. 2005); (3) communications made during legislative proceedings, *Butler v. Town of Argo*, 871 So. 2d 1, 23–25 (Ala. 2003), *Hillman v.*

Yarbrough, 936 So. 2d 1056 (Ala. 2006), Restatement (Second) of Torts § 590 (1977); (4) communications contained in legislative acts of Alabama which are made under authority of law; and (5) statements made during federally recognized labor grievance hearings, Walker v. Majors, 496 So. 2d 726, 730 (Ala. 1986); Surrency v. Harbison, 489 So. 2d 1097 (Ala. 1986).

Whether a communication is privileged because of its character or the occasion on which it is made is a question of law for the trial judge.

When the claimed privileged statement is made during the course of a judicial proceeding, whether it was relevant or pertinent to the proceeding is a question of law, and the trial judge must use a liberal view when interpreting the language and resolve all doubts in favor of its relevance or pertinence. Walker at 730.

References

Hollander v. Nichols, 19 So. 3d 184 (Ala. 2009).

Hillman v. Yarbrough, 936 So. 2d 1056 (Ala. 2006). Legislative privilege.

Barnett v. Mobile County Personnel Bd., 536 So. 2d 46 (Ala. 1988). Absolute privilege extends to matters in judicial proceedings which are contemplated in good faith and under serious consideration.

Walker v. Majors, 496 So. 2d 726, 730 (Ala. 1986). The Court adopted Restatement (Second) of Torts § 587 (1977) as the appropriate standard to apply in connection with judicial proceedings.

Webster v. Byrd, 494 So. 2d 31, 35, 34 Ed. Law Rep. 1290 (Ala. 1986).

O'Barr v. Feist, 292 Ala. 440, 296 So. 2d 152 (1974).

Drees v. Turner, 45 So. 3d 350 (Ala. Civ. App. 2010).

West's Key Number Digest, Libel and Slander ◊36, 37, 38(1), 51(5), 123(8).

West's Key Number Digest, Torts ◊122

1 Ally W. Howell, Alabama Personal Injury and Torts § 12:25 (2012).

APJI 23.05**ALABAMA PATTERN JURY INSTRUCTIONS**

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 24.10 (5th ed. 2010).

Jenelle Mims Marsh, *Alabama Law of Damages* § 36:26 p. 885–86 (6th ed. 2012).

2 Rodney A. Smolla, *Law of Defamation* §§ 8:5 to 8:37 (May, 2015).

Restatement (Second) of Torts §§ 587, 590 (1977).

Ala. Const. Art IV, § 56.

Am. Jur. 2d, Libel and Slander § 193, 255 to 318.

Am. Jur. 2d, Torts § 50.

APJI 23.06 QUALIFIED PRIVILEGE [PL]

(Name of defendant) says (state the communication) is protected by a qualified privilege and (name of plaintiff) cannot recover.

The (statement, etc.) is covered by the privilege unless (name of defendant) made the statement with ill will or spite toward (name of plaintiff). (Name of plaintiff) says (describe the statement, etc.) is not covered by a qualified privilege because (name of defendant) made the (statement, etc.) with ill will or spite towards (name of plaintiff). This is something (name of plaintiff) must prove and you must decide.

Approved July 10, 2015

Notes on Use

The user should be aware there is a possible conflict of authority on the plaintiff's burden of proof necessary to overcome a qualified privilege.

When the plaintiff is a private person and the matter is of purely personal concern, the plaintiff must plead and prove that the defamatory statement was made with common-law malice. The instruction states the common-law standard. *Barnett v. Mobile County Personnel Bd.*, 536 So. 2d 46 (Ala. 1988) and *Ex parte Blue Cross and Blue Shield of Alabama*, 773 So. 2d 475 (Ala. 2000), hold that when the plaintiff is a public figure or official he or she must overcome the qualified privilege by proving constitutional malice. However, *Gary v. Crouch*, 867 So. 2d 310 (Ala. 2003) (Gary I) reversed summary judgment for the defendant because the public figure plaintiff's filing presented an issue of fact whether the defendant made the statement with common-law malice.

References

Wiggins v. Mallard, 905 So. 2d 776 (Ala. 2004).

Butler v. Town of Argo, 871 So. 2d 1 (Ala. 2003).

Ex parte Blue Cross and Blue Shield of Alabama, 773 So. 2d 475 (Ala. 2000).

Fulton v. Advertiser Co., 388 So. 2d 533 (Ala. 1980) (per curiam).

Little v. Consolidated Pub. Co., 83 So. 3d 517 (Ala. Civ. App. 2011).

West's Key Number Digest, Libel and Slander ⇨41, 45(2), 50, 51(1), 100(5), 101(4).

2 Ally Windsor Howell, Alabama Personal Injury & Torts § 12:20 (2014 ed.).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.09 (5th ed. 2010).

Jenelle Mims Marsh, Alabama Law of Damages § 36:26 pp. 885–87 (6th ed. 2012).

Am. Jur. 2d, Libel and Slander §§ 255 to 318.

A conditional privilege exists when reporting certain criminal or investigatory, etc., matters. Ala. Code § 13A-11-161 (1975) (West's Alabama Code). Birmingham Broadcasting (WVTM-TV) LLC v. Hill, Ms. 1180343, 2020 WL 964285 *5 (Ala. Feb. 28, 2020).

**APJI 23.07 TRUTH—AFFIRMATIVE DEFENSE
[PL]**

(Name of defendant) says the statement(s) (is/are) substantially true. If (he/she/it) proves to your reasonable satisfaction from the evidence the statement(s) (is/are) substantially true (name of plaintiff) cannot recover.

The term substantially true does not mean somewhat true or partially true. It does not mean the statement is true in every possible and unimportant respect. It means the statement is true without qualification in all material respects. What is material is what would naturally and probably affect (name of plaintiff)'s reputation in the mind of the (average lay reader/average lay viewer/average lay listener).

Approved November 6, 2015

Notes on Use

Use this instruction when the defendant pleads truth as an affirmative defense. *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988).

When the defendant does not plead the affirmative defense of truth but only denies the plaintiff's claim, the defendant can present evidence the statement was true or evidence about the circumstances under which the statement was made. But, the evidence is admitted only to mitigate damages. Ala. Code § 6-5-183 (1975) (West's Alabama Code).

References

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991) (Sullivan malice). "[M]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge can be justified."

Federal Credit, Inc. v. Fuller, 72 So. 3d 5 (Ala. 2011).

McCaig v. Talladega Pub. Co., Inc., 544 So. 2d 875 (Ala. 1989).

Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085 (Ala. 1988).

APJI 23.07**ALABAMA PATTERN JURY INSTRUCTIONS**

Ripps v. Herrington, 241 Ala. 209, 1 So. 2d 899 (1941).

Alabama Ride Co. v. Vance, 235 Ala. 263, 178 So. 438 (1938).

Kirkpatrick v. Journal Pub. Co., 210 Ala. 10, 97 So. 58 (1923).

West's Key Number Digest, Libel and Slander ⇨30, 32, 54, 94(1), 101(4), 101(5).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.11 (5th ed. 2010).

1 Rodney A. Smolla, Law of Defamation § 5:27 (May 2015).

APJI 23.08 to 23.09**Reserved**

**APJI 23.10 COMPENSATORY DAMAGES—
ACTUAL HARM (LIBEL/SLANDER
PER SE) [PL]**

(Name of plaintiff) asks for compensatory damages for (state the types).

You should award compensatory damages if (name of plaintiff) reasonably satisfied you from the evidence that the (libel/slander) caused (him/her/it) actual harm. These damages are an amount of money that fairly and reasonably compensates (name of plaintiff) for that harm.

Damages for actual harm are not limited to out-of-pocket loss. The damages may include an amount for a lessened reputation and loss of standing in the community, personal shame, and mental anguish and suffering.

Approved September 11, 2015

Notes on Use

Use this instruction when the trial judge determines, as a matter of law, that the plaintiff is a private person and the communication was a matter of private concern, and the communication is libelous *per se* or slanderous *per se*.

A statement is libelous *per se* if the language itself, without resort to extrinsic facts, exposes the plaintiff to public ridicule or contempt, even if the statement does not contain an accusation of crime. A statement is slanderous *per se* if it contains an imputation of an indictable offense involving infamy or moral turpitude.

See, APJI 23.12 (3d ed. 2015), Nominal Damages. See, APJI 11.10, Personal Injury—Physical Pain and Mental Anguish.

References

Ala. Code § 6-5-181 (1975) (West's Alabama Code), held unconstitutional, *Butler v. Town of Argo*, 871 So. 2d 1, 17 (Ala. 2003). Statements that falsely impute a want of chastity to a woman.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

Sunshine Investments, Inc. v. Brooks, 642 So. 2d 408, 410 (Ala. 1994), if referable to a woman, a want of chastity.

Gray v. WALA-TV, 384 So. 2d 1062, 1064–1065 (Ala. 1980), overruled on other grounds by Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1091 n.3 (Ala. 1988).

White v. Birmingham Post Co., 233 Ala. 547, 172 So. 649, 651–652 (1937).

Marion v. Davis, 217 Ala. 16, 114 So. 357, 359, 55 A.L.R. 171 (1927).

West's Key Number Digest, Libel and Slander ☞7(2).

Jenelle Mims Marsh, Alabama Law of Damages §§ 36:27 to 36:28 (6th ed. 2012).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.03 (5th ed. 2010).

APJI 23.11 PRESUMED COMPENSATORY DAMAGES—LIBEL PER SE OR SLANDER PER SE [PL]

If you find for (name of plaintiff) on (his/her/its) claim that (specify the statement), you may award (name of plaintiff) damages for harm to (his/her/its) reputation and damages for mental anguish. The law presumes damages to reputation and damages for mental anguish and (name of plaintiff) does not have to prove them.

The amount you award is up to you, but you must base the award on sound judgment and the evidence in this case. The award must reasonably compensate (name of plaintiff) for the harm to (his/her/its) reputation and for mental anguish.

Approved September 11, 2015

Notes on Use

Use this instruction when the trial judge has determined, as a matter of law, that (1) the plaintiff is a private person, (2) the statement was about a matter of purely private concern; and (3) the statement was libel *per se* or slander *per se*.

References

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985).

Connick v. Myers, 461 U.S. 138, 147–148 n.8, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). The question of whether the publication is a matter of public or private concern is an issue of law for the court.

Pensacola Motor Sales, Inc. v. Daphne Automotive, LLC, 155 So. 3d 930 (Ala. 2013).

Drill Parts and Service Co., Inc. v. Joy Mfg. Co., 619 So. 2d 1280, 1289 (Ala. 1993).

Ex parte Rudder, 507 So. 2d 411, 416 (Ala. 1987).

Myers v. Mobile Press-Register, Inc., 266 Ala. 508, 97 So. 2d 819 (1957).

White v. Birmingham Post Co., 233 Ala. 547, 172 So. 649, 651–652 (1937). A statement is libelous *per se* if the language itself, without resort to extrinsic facts, exposes the plaintiff to public ridicule or contempt, even if the statement does not contain an accusation of crime.

Marion v. Davis, 217 Ala. 16, 114 So. 357, 359 (1927).

West's Key Number Digest, Libel and Slander ⇨33.

Jenelle Mims Marsh, Alabama Law of Damages §§ 36:27 to 36:28 (6th ed. 2012).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.03 (5th ed. 2010).

Am. Jur. 2d, Libel and Slander §§ 357 to 359.

APJI 23.12 NOMINAL DAMAGES—LIBEL PER SE OR SLANDER PER SE [PL]

If (name of plaintiff) did not prove the statement caused (him/her/it) substantial harm, you may award nominal damages. Nominal damages are a very small amount, usually \$1.00. The purpose of nominal damages is to clear (name of plaintiff)'s reputation because the award shows (he/she/it) won the lawsuit against (name of defendant).

Approved November 6, 2015

Notes on Use

Use this instruction when the court has determined, as a matter of law, that the statement is libelous *per se* or slanderous *per se*.

References

Ala. Code § 6-5-181 (1975) (West's Alabama Code), held unconstitutional, *Butler v. Town of Argo*, 871 So. 2d 1, 17 (Ala. 2003).

Delta Health Group, Inc. v. Stafford, 887 So. 2d 887 (Ala. 2004).

Sunshine Investments, Inc. v. Brooks, 642 So. 2d 408, 410 (Ala. 1994).

Marion v. Davis, 217 Ala. 16, 114 So. 357 (1927) (falsely imputing to a woman a want of chastity is by statute *prima facie* malicious).

Advertiser Co. v. Jones, 169 Ala. 196, 169 Ala. 670, 53 So. 759 (1910).

West's Key Number Digest, Libel and Slander ⇨33.

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 3:1, 3:2 (6th ed. 2012).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 24.03 (5th ed. 2010).

Am. Jur. 2d, Libel and Slander § 361.

APJI 23.12**ALABAMA PATTERN JURY INSTRUCTIONS**

Restatement (Second) of Torts § 620 (1976).

APJI 23.13 MITIGATION—RETRACTION [PL]

If (name of defendant) proved to your reasonable satisfaction from the evidence that:

1. (He/she/it) published the statement in good faith by mistake or by accidental oversight, or a misinterpretation of something; and,

2. (He/she/it) retracted the statement (in the same medium, e.g., during a news broadcast, in the newspaper, etc.) and in a way to catch the (viewer's, listener's, reader's) attention. A retraction is a withdrawal of the statement.

You may consider this in determining the amount of damages, if any, you award (name of plaintiff).

The defendant acted in good faith if (he/she/it) made the statement based on more than mere suspicion. Good faith conduct requires that (name of defendant) made the same inquiry a fair and just person would make to reach an honest belief that the statement was true.

Approved November 6, 2015

Notes on Use

Use this instruction when the defendant raises retraction of the statement in mitigation of damages under Ala. Code § 6-5-184 (1975) (West's Alabama Code). The instruction is § 6-5-184 rewritten in Plain Language.

References

Ala. Code § 6-5-184 (1975) (West's Alabama Code).

2 Rodney A. Smolla, *Law of Defamation* § 9:70 (2d ed. 2015).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 24.16 (5th ed. 2010).

**APJI 23.14 ACTUAL DAMAGES—RETRACTION
WITHIN TEN DAYS OF
PUBLICATION [PL]**

If (name of defendant) proved to your reasonable satisfaction from the evidence that:

1. (He/she/it) published the statement in good faith by mistake or by accidental oversight, or a misinterpretation of something; and,

2. (He/she/it) retracted the statement within ten days of (date of publication) (in the same medium, e.g., during a news broadcast, in the newspaper, etc.) and in a way to catch the (viewer's, listener's, reader's) attention. A retraction is a withdrawal of the statement.

If defendant proved these things (name of plaintiff) can recover only actual damages.

The defendant acted in good faith if (he/she/it) made the statement based on more than mere suspicion. Good faith conduct requires that (name of defendant) made the same inquiry a fair and just person would make to reach an honest belief that the statement was true.

Approved November 6, 2015

Notes on Use

Use this instruction when the defendant raises retraction of the statement in mitigation of damages under Ala. Code §§ 6-5-184 & 6-5-185 (1975) (West's Alabama Code). The instruction is §§ 6-5-184 & 6-5-185 combined and rewritten in Plain Language.

“A retraction is a withdrawal of the defamatory charge.” 2 Rodney A. Smolla, *Law of Defamation* § 9:70 (2d ed. 2015).

References

Ala. Code § 6-5-184 (1975) (West's Alabama Code).

Ala. Code § 6-5-185 (1975) (West's Alabama Code).

West's Key Number Digest, Libel and Slander ☞56(4), 121(5).

2 Rodney A. Smolla, Law of Defamation § 9:70 (2d ed. 2015).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.16 (5th ed. 2010).

Am. Jur. 2d, Libel and Slander §§ 325 to 329, 390.

**APJI 23.15 PUNITIVE DAMAGES—SLANDER—
PRIVATE PERSON AND MATTER
OF PURELY PRIVATE CONCERN
[PL]**

Punitive damages are awarded to a plaintiff to punish a defendant for (his/her/its) wrongful conduct, and to protect the public by deterring or discouraging a defendant and others from doing the same or similar things in the future.

Before you can award punitive damages, you must have decided to award (name of plaintiff) compensatory or nominal damages.

To recover punitive damages (name of plaintiff) must first prove to your reasonable satisfaction from the evidence that (name of defendant) published the statement with ill will or spite.

(Name of plaintiff) must also prove by clear and convincing evidence that (name of defendant) consciously or deliberately acted toward (name of plaintiff) with (oppression) (fraud) (wantonness) or (malice).

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim and a high probability that your conclusion is correct.

Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt.

(Oppression means causing (name of plaintiff) to undergo cruel and unjust hardship in knowing disregard of (his/her/its) rights.)

(Fraud means an intentional misrepresentation, deceit, or concealment of an important fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious

and committed by (name of defendant) with the intention of depriving (name of plaintiff) of (his/her/its) property or legal rights or otherwise causing injury.)

(Wantonness is conduct that is carried on with a reckless or conscious disregard of (name of plaintiff)'s rights.)

(Malice is the intentional doing of a wrongful act without just cause or excuse, either:

1. With an intent to harm (name of plaintiff)'s reputation or lower (his/her/its) esteem in the community, or make others not want to associate with (name of plaintiff), or
2. Under circumstances that the law will imply an evil intent.)

Whether you award punitive damages is up to you. If you do, the amount of the award is determined by the character and degree of (name of defendant)'s wrongful conduct, and the necessity to prevent the same or similar wrongful conduct by (him/her/it) and others in the future.

Approved November 6, 2015

Notes on Use

Use this instruction in slander claims when the plaintiff seeks punitive damages and they are not barred by law. The trial judge must have determined, as a matter of law, that the plaintiff is a private figure and the statement is about a matter of purely private concern.

Ala. Code § 6-11-20 (1975) (West's Alabama Code) applies in all civil tort actions, except actions brought under § 6-5-391 and § 6-5-410, when the plaintiff seeks an award of punitive damages. Therefore, the trial judge must instruct the jury on the applicable criteria stated in § 6-11-20(b) because the plaintiff must satisfy one of them before the jury may award punitive damages.

The statement "under circumstances that the law will imply an evil intent", § 6-11-20(b)(2)(a), is a legislative recognition there

are other circumstances that will satisfy the malice requirement. The user must determine those circumstances as a matter of law and draft an appropriate instruction based on the facts of the case.

Because “reasonable doubt” is not defined in Ala. Code § 6-11-20 (1975) (West’s Alabama Code), it may be appropriate to instruct the jury on reasonable doubt to draw the distinction between the terms. One instruction on reasonable doubt is, as follows:

A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in this case. It is a doubt based on reason and common sense. A reasonable doubt is not a notion that is confused or contrary to reason. It is an actual doubt based on the evidence, or lack of evidence, or a combination of them. It is a doubt that remains after going over in your mind the entire case and considering all the evidence. A reasonable doubt is different from a doubt based on a mere possibility, or a doubt based on bare imagination, or a doubt based on guesswork.

See APJI 11.03, Punitive Damages.

References

Ala. Code § 6-11-20 (1975) (West’s Alabama Code).

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985).

Pensacola Motor Sales, Inc. v. Daphne Automotive, LLC, 155 So. 3d 930 (Ala. 2013).

Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085, 1095–1096 (Ala. 1988).

Tanner v. Ebbole, 88 So. 3d 856 (Ala. Civ. App. 2011).

Lewis v. Ritch, 417 So. 2d 210, 212 (Ala. Civ. App. 1982). “Malice, actual or expressed, may be shown by evidence of hostility, rivalry, the violence of the language, and prior information regarding its falsity.”

West’s Key Number Digest, Libel and Slander ¶120(2).

Jenelle M. Marsh, *Alabama Law of Damages* §§ 36:26 to 36:28 (6th ed. 2012).

Ally W. Howell, Alabama Personal Injury and Torts § 16:44 (2012).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.16 (5th ed. 2010).

**APJI 23.16 PUNITIVE DAMAGES—SLANDER—
PUBLIC FIGURE, LIMITED-
PURPOSE PUBLIC FIGURE,
PUBLIC OFFICIAL [PL]**

Punitive damages are awarded to a plaintiff to punish a defendant for (his/her/its) wrongful conduct, and to protect the public by deterring or discouraging a defendant and others from doing the same or similar wrongs in the future.

Before you can award punitive damages you must have decided to award (name of plaintiff) compensatory or nominal damages.

To recover punitive damages (name of plaintiff) must first prove by clear and convincing evidence that:

When (name of defendant) published the statement:

1. (He/she/it) knew the statement was false or (he/she/it), or
2. (He/she/it) had a high degree of awareness the statement was false, or
3. (He/she/it) had a serious doubt that the statement was true.

(Name of plaintiff) must also prove by clear and convincing evidence that (name of defendant) consciously or deliberately acted toward (name of plaintiff) with (oppression) (fraud) (wantonness) or (malice).

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim and a high probability that your conclusion is correct.

Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt.

(Oppression means causing (name of plaintiff) to undergo cruel and unjust hardship in knowing disregard of (his/her/its) rights.)

(Fraud means an intentional misrepresentation, deceit, or concealment of an important fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed by (name of defendant) with the intention of depriving (name of plaintiff) of (his/her/its) property or legal rights or otherwise causing injury.)

(Wantonness is conduct that is carried on with a reckless or conscious disregard of (name of plaintiff)'s rights.)

(Malice is the intentional doing of a wrongful act without just cause or excuse, either:

1. With an intent to harm (name of plaintiff)'s reputation or lower (his/her/its) esteem in the community, or make others not want to associate with (name of plaintiff), or
2. Under circumstances that the law will imply an evil intent.)

Whether you award punitive damages is up to you. If you do, the amount of the award is determined by the character and degree of (name of defendant)'s wrongful conduct, and the necessity to prevent the same or similar wrongful conduct by (him/her/it) and others in the future.

Approved November 6, 2015

Notes on Use

Use this instruction in slander claims when the plaintiff seeks punitive damages that are not barred by law and the defendant is a public figure, a limited purpose public figure or a public official.

Use APJI 23.11 when the court has determined, as a matter of law, that the plaintiff is a private figure and the statement is about a matter of purely private concern. *Ex parte Rudder*, 507 So. 2d 411, 416 (Ala. 1987).

Ala. Code § 6-11-20 (1975) (West's Alabama Code) applies in all civil tort actions, except actions brought under § 6-5-391 and § 6-5-410, when the plaintiff seeks an award of punitive damages. Therefore, the trial judge must instruct the jury on the applicable criteria stated in § 6-11-20(b) because the plaintiff must satisfy one of them before the jury may award punitive damages.

The statement “under circumstances that the law will imply an evil intent”, § 6-11-20(b)(2)(a), is a legislative recognition there are other circumstances that will satisfy the malice requirement. The user must determine those circumstances as a matter of law and draft an appropriate instruction based on the facts of the case.

Because “reasonable doubt” is not defined in Ala. Code § 6-11-20 (1975) (West's Alabama Code), it may be appropriate to instruct the jury on reasonable doubt to draw the distinction between the terms. One instruction on reasonable doubt is, as follows:

A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in this case. It is a doubt based on reason and common sense. A reasonable doubt is not a notion that is confused or contrary to reason. It is an actual doubt based on the evidence, or lack of evidence, or a combination of them. It is a doubt that remains after going over in your mind the entire case and considering all the evidence. A reasonable doubt is different from a doubt based on a mere possibility, or a doubt based on bare imagination, or a doubt based on guesswork.

See APJI 11.03, Punitive Damages.

References

Ala. Code § 6-11-20 (1975) (West's Alabama Code).

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985).

Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085 (Ala. 1988).

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 36:26 to 36:28 (6th ed. 2012).

Ally W. Howell, *Alabama Personal Injury and Torts* § 16:44 (2012).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort*

Law § 24.16 (5th ed. 2010).

**APJI 23.17 PUNITIVE DAMAGES—LIBEL—
PRIVATE PERSON/PRIVATE
CONCERN (NEW) [PL]**

Punitive damages are awarded to a plaintiff to punish a defendant for (his/her/its) wrongful conduct, and to protect the public by deterring or discouraging a defendant and others from doing the same or similar wrongs in the future.

Before you can award punitive damages you must have decided to award (name of plaintiff) compensatory or nominal damages.

To recover punitive damages (name of plaintiff) must first prove to your reasonable satisfaction from the evidence that:

1. When (name of defendant) published the statement (he/she/it) knew the statement was false, or

When (he/she/it) published the statement with reckless disregard of whether it was false or not;

2. At least five days before (the date plaintiff filed the action) (name of plaintiff) sent a written demand to (name of defendant) that (he/she/it) publicly retract the statement; and,

(3. (Name of defendant) did not, within five days of the written demand publish a retraction of the statement.)

-or-

(3. (Name of defendant) did not within five days of the written demand fully and fairly retract the statement (in the same medium, e.g., during a news broadcast, in the newspaper, etc.) and in a way to catch the (viewer's/listener's/reader's) attention.).

A retraction is a withdrawal of the statement.

(Name of plaintiff) must also prove by clear and convinc-

ing evidence that (name of defendant) consciously or deliberately acted toward (name of plaintiff) with (oppression) (fraud) (wantonness) or (malice).

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim and a high probability that your conclusion is correct.

Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt.

(Oppression means causing (name of plaintiff) to undergo cruel and unjust hardship in knowing disregard of (his/her/its) rights.)

(Fraud means an intentional misrepresentation, deceit, or concealment of an important fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed by (name of defendant) with the intention of depriving (name of plaintiff) of (his/her/its) property or legal rights or otherwise causing injury.)

(Wantonness is conduct that is carried on with a reckless or conscious disregard of (name of plaintiff)'s rights.)

(Malice is the intentional doing of a wrongful act without just cause or excuse, either:

1. With an intent to harm (name of plaintiff)'s reputation or lower (his/her/its) esteem in the community, or make others not want to associate with (name of plaintiff), or
2. Under circumstances that the law will imply an evil intent.)

Whether you award punitive damages is up to you. If you do, the amount of the award is determined by the character and degree of (name of defendant)'s wrongful

conduct, and the necessity to prevent the same or similar wrongful conduct by (him/her/it) and others in the future.

Approved November 6, 2015

Notes on Use

Ala. Code § 6-11-20 (1975) (West's Alabama Code) applies in all civil tort actions, except actions brought under § 6-5-391 and § 6-5-410, when the plaintiff seeks an award of punitive damages. Therefore, the trial judge must instruct the jury on the applicable criteria stated in § 6-11-20(b) because the plaintiff must satisfy one of them before the jury may award punitive damages.

The statement “under circumstances that the law will imply an evil intent”, § 6-11-20(b)(2)(a) is a legislative recognition there are other circumstances that will satisfy the malice requirement. The user must determine those circumstances as a matter of law and draft an appropriate instruction based on the facts of the case.

Because “reasonable doubt” is not defined in Ala. Code § 6-11-20 (1975) (West's Alabama Code), it may be appropriate to instruct the jury on reasonable doubt to draw the distinction between the terms. One instruction on reasonable doubt is, as follows:

A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in this case. It is a doubt based on reason and common sense. A reasonable doubt is not a notion that is confused or contrary to reason. It is an actual doubt based on the evidence, or lack of evidence, or a combination of them. It is a doubt that remains after going over in your mind the entire case and considering all the evidence. A reasonable doubt is different from a doubt based on a mere possibility, or a doubt based on bare imagination, or a doubt based on guesswork.

See APJI 11.03, Punitive Damages.

References

Ala. Code § 6-5-186 (1975) (West's Alabama Code).

Ala. Code § 6-11-20 (1975) (West's Alabama Code).

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 36:26 to 36:28 (6th ed. 2012).

2 Ally W. Howell, Alabama Personal Injury and Torts § 16:44 (2015).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.16 (5th ed. 2010).

**APJI 23.18 PUNITIVE DAMAGES—LIBEL—
PRIVATE PERSON/PUBLIC
CONCERN OR PUBLIC FIGURE,
ETC. [PL]**

Punitive damages are awarded to a plaintiff to punish a defendant for (his/her/its) wrongful conduct, and to protect the public by deterring or discouraging a defendant and others from doing the same or similar wrongs in the future.

Before you can award punitive damages you must have decided to award (name of plaintiff) compensatory or nominal damages.

To recover punitive damages (name of plaintiff) must first prove to your reasonable satisfaction from the evidence that:

1. When (name of defendant) published the statement:
 - a. (He/she/it) knew the statement was false, or
 - b. (He/she/it) had a high degree of awareness the statement was false, or
 - c. (He/she/it) had a serious doubt that the statement was true.
2. At least five days before (the date plaintiff filed the action) (name of plaintiff) sent a written demand to (name of defendant) that (he/she/it) publicly retract the statement; and,
- (3. (Name of defendant) did not, within five days of the written demand, publish a full and fair retraction in as prominent and public place or manner as (he/she/it) published the original statement.)

-or-

- (3. (Name of defendant) did not fully and fairly retract

the statement (in the same medium, e.g., during a news broadcast, in the newspaper, etc.) and in a way to catch the (viewer's/listener's/reader's) attention.).

A retraction is a withdrawal of a statement.

(Name of plaintiff) must also prove by clear and convincing evidence that (name of defendant) consciously or deliberately acted toward (name of plaintiff) with (oppression) (fraud) (wantonness) or (malice).

Clear and convincing evidence means evidence that, when weighed against opposing evidence, produces in your mind a firm conviction about each element of the claim and a high probability that your conclusion is correct.

Proof by clear and convincing evidence requires a level of proof greater than proof to your reasonable satisfaction from the evidence or the substantial weight of the evidence, but it is less than proof beyond a reasonable doubt.

(Oppression means causing (name of plaintiff) to undergo cruel and unjust hardship in knowing disregard of (his/her/its) rights.)

(Fraud means an intentional misrepresentation, deceit, or concealment of an important fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed by (name of defendant) with the intention of depriving (name of plaintiff) of (his/her/its) property or legal rights or otherwise causing injury.)

(Wantonness is conduct that is carried on with a reckless or conscious disregard of (name of plaintiff)'s rights.)

(Malice is the intentional doing of a wrongful act without just cause or excuse, either:

1. With an intent to harm (name of plaintiff)'s reputation or lower (his/her/its) esteem in the community, or make others not want to associate with (name of plaintiff), or

2. Under circumstances that the law will imply an evil intent.)

Whether you award punitive damages is up to you. If you do, the amount of the award is determined by the character and degree of (name of defendant)’s wrongful conduct, and the necessity to prevent the same or similar wrongful conduct by (him/her/it) and others in the future.

Approved November 6, 2015

Notes on Use

Ala. Code § 6-11-20 (1975) (West’s Alabama Code) applies in all civil tort actions, except actions brought under § 6-5-391 and § 6-5-410, when the plaintiff seeks an award of punitive damages. Therefore, the trial judge must instruct the jury on the applicable criteria stated in § 6-11-20(b) because the plaintiff must satisfy one of them before the jury may award punitive damages.

The statement “under circumstances that the law will imply an evil intent”, § 6-11-20(b)(2)(a), is a legislative recognition there are other circumstances that will satisfy the malice requirement. The user must determine those circumstances as a matter of law and draft an appropriate instruction based on the facts of the case.

Because “reasonable doubt” is not defined in Ala. Code § 6-11-20 (1975) (West’s Alabama Code), it may be appropriate to instruct the jury on reasonable doubt to draw the distinction between the terms. One instruction on reasonable doubt is, as follows:

A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in this case. It is a doubt based on reason and common sense. A reasonable doubt is not a notion that is confused or contrary to reason. It is an actual doubt based on the evidence, or lack of evidence, or a combination of them. It is a doubt that remains after going over in your mind the entire case and considering all the evidence. A reasonable doubt is different from a doubt based on a mere possibility, or a doubt based on bare imagination, or a doubt based on guesswork.

See APJI 11.03, Punitive Damages.

References

Ala. Code § 6-5-186 (1975) (West's Alabama Code).

Ala. Code § 6-11-20 (1975) (West's Alabama Code).

Jenelle Mims Marsh, Alabama Law of Damages §§ 36:26 to 36:28 (6th ed. 2012).

2 Ally W. Howell, Alabama Personal Injury and Torts § 16:44 (2015).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 24.16 (5th ed. 2010).

Chapter 24

Malicious Prosecution [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 24.00 Malicious Prosecution—Underlying Civil Case Elements [PL]
- APJI 24.01 Reliance on Advice of Counsel [PL]
- APJI 24.02 Malicious Prosecution—Underlying Criminal Prosecution Elements [PL]
- APJI 24.03 Termination in Plaintiff’s Favor—Nolle Prosequi or Dismissal Based on Settlement or Compromise [PL]
- APJI 24.04 *Presumption*—Discharged At Preliminary Hearing—No Indictment or Grand Jury “No-Billed” [PL]
- APJI 24.05 *Presumption*—Warrant—Conviction in Lower Court—Nol Pros After Appeal to Circuit Court [PL]
- APJI 24.06 *Presumption*—Warrant—Conviction in Lower Court—Acquittal on Appeal [PL]
- APJI 24.07 *Presumption*—Indictment—Nol Pressed [PL]
- APJI 24.08 *Presumption*—Conviction Reversed or Vacated on Appeal—Acquittal on Retrial [PL]
- APJI 24.09 *Presumption*—Warrant—Indictment—Acquittal

Title of Instruction	Date Approved	Prior Instruction Number
24.00 Malicious Prosecution—Underlying Civil Case—Elements [PL]	10/10/14	24.06–24.11
24.01 Reliance on Advice of Counsel [PL]	10/10/14	24.12
24.02 Malicious Prosecution—Underlying Criminal Case—Elements [PL]	11/7/14	24.00–24.05

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Date Approved	Prior Instruction Number
24.03 Termination in Plaintiff's Favor—Nolle Prosequi Or Dismissal Based on Settlement or Compromise [PL]	11/7/14	24.13
24.04 <i>Presumption</i> —Discharged at Preliminary Hearing—No Indictment or Grand Jury “No-Billed” [PL]	11/7/14	24.21
24.05 <i>Presumption</i> —Warrant—Conviction in Lower Court—Nol Pross After Appeal to Circuit Court [PL]	11/7/14	24.18, 24.20
24.06 <i>Presumption</i> —Warrant—Conviction in Lower Court—Acquittal on Appeal [PL]	11/7/14	24.16
24.07 <i>Presumption</i> —Indictment—Nol Prossed [PL]	11/7/14	24.17
24.08 <i>Presumption</i> —Conviction Reversed or Vacated On Appeal—Acquittal on Retrial [PL]	11/7/14	24.14, 24.15
24.09 <i>Presumption</i> —Warrant—Indictment—Acquittal [PL]	11/7/14	24.19

**APJI 24.00 MALICIOUS PROSECUTION—
UNDERLYING CIVIL CASE
ELEMENTS [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) sued him in (name the court) for (state the claim). (Name of plaintiff) further says (name of defendant) did not have probable cause to file the lawsuit, and (he/she/it) filed it maliciously. Finally, (name of plaintiff) says the lawsuit ended in (his/her/its) favor.

(Name of defendant) says (he/she/it) had probable cause to file the lawsuit and (he/she/it) did not act maliciously.

(Name of defendant) says he filed the lawsuit on the advice of (his/her/its) lawyer.

To recover, (name of plaintiff) must prove all of the following:

1. That (name of defendant) sued (name of plaintiff),
2. That (name of defendant) lacked probable cause to file the lawsuit,
3. That (name of defendant) maliciously filed the lawsuit,
4. That the lawsuit ended in favor of (name of plaintiff); and,
5. That as a result of (name of defendant)'s lawsuit, (name of plaintiff) was harmed.

If (name of plaintiff) proved all these things you must find for (him/her/it), and then you must determine what amount of money to award (name of plaintiff).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Probable cause.

(Name of defendant) had probable cause if, when the lawsuit was filed, (he/she/it) reasonably believed there was a chance (he/she/it) could win the case in court.

Whether (name of defendant) had probable cause is judged in light of the facts as they appeared to (him/her/it) when the case was filed.

Malice.

A person acts with malice when (he/she/it) intentionally does a wrongful act. Malice does not require personal ill-will, hate, or desire to harm another person.

Malice inferred from lack of probable cause, wantonness or carelessness.

You can infer (name of defendant) acted with malice if (he/she/it) acted without probable cause, wantonly or carelessly. But, before you can infer malice from lack of probable cause, wanton or careless acts, (name of plaintiff) must have proved that (name of defendant) knew when (he/she/it) filed the case that filing it was wrong and unlawful.

Approved October 10, 2014

Notes on Use

This instruction combines APJI 24.06, 24.07, 24.08, 24.09, 24.10, and 24.11 (3d ed. 2013). It also restates the definitions of probable cause and malice in Plain Language, and it adds additional points of law about probable cause and malice.

Wantonness is defined in APJI 29.00. It should be modified by eliminating the word “safety.”

A person may have a duty to investigate further before it can be said he or she acted in good faith. *Hunter v. Mooring Tax Asset Group, LLC*, 53 So. 3d 879, 885–886 (Ala. 2009).

A person can be liable for malicious prosecution when he or

she continues to press litigation when he or she knows a mistake has been made or there is a problem with the case *Laney v. Glidden Co.*, 239 Ala. 396, 194 So. 849 (1940); *Barrett Mobile Home Transport, Inc. v. McGugin*, 530 So. 2d 730 (Ala. 1988); *Hunter v. Mooring Tax Asset Group, LLC*, 53 So. 3d 879 (Ala. 2009); *Dillon v. Nix*, 55 Ala. App. 611, 318 So. 2d 308 (Civ. App. 1975). But see, *Fina Oil and Chemical Co. v. Hood*, 621 So. 2d 253 (Ala. 1993). This instruction must be modified if plaintiff bases a malicious prosecution claim on this theory.

APJI 15.01, Inference.

References

Dolgencorp, LLC v. Spence, 224 So. 3d 173 (Ala. 2016).

Hunter v. Mooring Tax Asset Group, LLC, 53 So. 3d 879 (Ala. 2009).

Mitchell v. Folmar & Associates, LLP, 854 So. 2d 1115 (Ala. 2003) (voluntary dismissal without prejudice is a favorable termination). Contra, *Hughes v. Alba-Waldensian, Inc.*, 519 So. 2d 509 (Ala. 1988).

Willis v. Parker, 814 So. 2d 857 (Ala. 2001).

Pannell v. Reynolds, 655 So. 2d 935 (Ala. 1994).

Fina Oil and Chemical Co. v. Hood, 621 So. 2d 253 (Ala. 1993).

Barrett Mobile Home Transport, Inc. v. McGugin, 530 So. 2d 730 (Ala. 1988).

Tapscott v. Fowler, 437 So. 2d 116 (Ala. 1983), overruled on other grounds, *Drill Parts and Service Co., Inc. v. Joy Mfg. Co.*, 619 So. 2d 1280, 1288 (Ala. 1993) (lack of probable cause not an essential element of an abuse of process claim).

McAnally v. Key, 414 So. 2d 79 (Ala. 1982).

Laney v. Glidden Co., 239 Ala. 396, 194 So. 849 (1940) (*Glidden II*).

SouthTrust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So. 2d 885 (Ala. Civ. App. 2005).

West's Key Number Digest, Malicious Prosecution Nos. ☞1 et seq.

APJI 24.00**ALABAMA PATTERN JURY INSTRUCTIONS**

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Law of Torts* §§ 27.01[1] to [5] (5th ed. 2010).

Jenelle Mims Marsh, *Alabama Law of Damages* §§ 9:4, 36:40 (6th ed. 2012).

W. Page Keeton, et al., *Prosser and Keeton on Torts* § 119 (5th ed. 1984).

Am. Jur. 2d, *Malicious Prosecution* §§ 1 et. seq.

Mark Adam Crosswhite, *Abuse of Process and Malicious Prosecution in Alabama*, 38 Ala. L. Rev. 99 (Fall 1986).

**APJI 24.01 RELIANCE ON ADVICE OF
COUNSEL [PL]**

(Name of defendant) says (he/she/it) had probable cause to file the lawsuit. (He/she/it) says that before the lawsuit was filed (he/she/it) talked to a lawyer and relied in good faith on the lawyer’s advice.

Advice of a lawyer is a complete defense to (name of plaintiff)’s claim for malicious prosecution.

To prove this, (name of defendant) must prove to your reasonable satisfaction from the evidence all of the following:

- 1. (He/she/it) made a full disclosure of all important facts to the lawyer;
- 2. (He/she/it) asked the lawyer’s advice whether the action (he/she/it) planned to take was legal;
- 3. The lawyer told (name of defendant) that the action was legal; and,
- 4. (Name of defendant) relied in good faith on the lawyer’s advice.

If (name of defendant) proved all these things you must find for (him/her/it).

Approved October 10, 2014

Notes on Use

This instruction is patterned on APJI 20.44 Bad Faith – Reliance on Advice of Counsel.

References

Delchamps, Inc. v. Bryant, 738 So. 2d 824 (Ala. 1999).
Pannell v. Reynolds, 655 So. 2d 935 (Ala. 1994).
Hanson v. Couch, 360 So. 2d 942 (Ala. 1978).

APJI 24.01**ALABAMA PATTERN JURY INSTRUCTIONS**

Lewis v. Dothan Drug Co., 247 Ala. 279, 24 So. 2d 119 (1945).

McDuff v. Turner, 679 So. 2d 1071 (Ala. Civ. App. 1996).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Law of Torts § 27.01[3] (5th ed. 2010).

West's Key Number Digest, Malicious Prosecution ⚙21(2).

Am. Jur. 2d, Malicious Prosecution § 145.

**APJI 24.02 MALICIOUS PROSECUTION—
UNDERLYING CRIMINAL
PROSECUTION ELEMENTS [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) began a criminal prosecution against (name of plaintiff) for (state the charge). (Name of plaintiff) further says (name of defendant) did not have probable cause to begin the criminal prosecution, and (name of defendant) did it maliciously. Finally, (name of plaintiff) says the criminal prosecution ended in (his/her) favor.

(Name of defendant) says (he/she/it) (did not begin the criminal prosecution); (had probable cause to begin the criminal prosecution); (did not act maliciously).

((Name of defendant) says (he/she/it) acted on the advice of (his/her/its) lawyer.)

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of defendant) began a criminal prosecution against (name of plaintiff);
2. That (name of defendant) lacked probable cause to begin the criminal prosecution;
3. That (name of defendant) maliciously began the criminal prosecution;
4. That the criminal prosecution ended in favor of (name of plaintiff); and,
5. That as a result of (name of defendant) (beginning/continuing) the criminal prosecution, (name of plaintiff) was harmed.

If (name of plaintiff) proved all these things you must find for (him/her), and then you must determine what amount of money to award (name of plaintiff).

If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Initiated a criminal prosecution.

((Name of defendant) did not begin a criminal prosecution if (he/she/it) gave only information to a law enforcement officer or just answered the officer's questions. But, (name of defendant) must have told the truth. And, (he/she/it) must have told the officer all the important facts that (he/she/it) knew about what (name of plaintiff) did or did not do.))

((Name of defendant) did not begin the criminal prosecution if (he/she/it) only gave information to the district attorney and left it up to (him/her) to charge or not charge (name of plaintiff). But, (name of defendant) must have told the truth. And, (he/she/it) must have told the district attorney all the important facts about what (name of plaintiff) did or did not do.))

Probable cause.

(Name of defendant) had probable cause if (he/she/it) knew facts that would lead a person of ordinary caution and prudence to believe or have an honest and strong suspicion that (name of plaintiff) was guilty.

(Name of defendant)'s knowledge can be based on what (he/she) saw or heard or reliable information given to (him/her) by another person.

Whether (name of defendant) had probable cause is judged in light of the facts as they appeared to (him/her/it) when (he/she/it) began (if (he/she/it) began) the criminal prosecution.

Malice.

A person acts with malice when (he/she/it) intentionally does a wrongful act. Malice can, but does not require, personal ill-will, hate, or desire to harm another person.

(You can infer (name of defendant) acted with malice if (he/she/it) acted without probable cause, wantonly or carelessly. But, before you can infer malice from lack of probable cause or wanton or careless acts, (name of plaintiff) must have proved that (name of defendant) knew when (he/she/it) began the criminal prosecution it was wrong and unlawful.)

Approved November 7, 2014

Notes on Use

This instruction combines APJI 24.00, 24.01, 24.02, 24.03, 24.04, and 24.05 (3d ed. 2013). It also restates the definitions of probable cause and malice in Plain Language, and it adds additional points of law about probable cause and malice.

The cases state that the defendant must have instituted, instigated or initiated a criminal prosecution. This instruction uses “began a criminal prosecution.”

Alabama cases define probable cause at least five different ways. See, e.g., *Ravenel v. Burnett*, 5 So. 3d 592, 598 (Ala. Civ. App. 2008); *Kmart Corp. v. Perdue*, 708 So. 2d 106, 109 (Ala. 1997); *Delchamps, Inc. v. Larry*, 613 So. 2d 1235, 1238 (Ala. 1992); *Robinson v. McPherson*, 602 So. 2d 352, 353 (Ala. 1992); *Crim v. Crim*, 39 Ala. App. 413, 417, 101 So. 2d 845, 848 (1958). The definition in this instruction defines probable cause in a way that is more understandable to a lay person and follows Alabama law.

Whether the criminal case ended in plaintiff’s favor depends on the facts of each case. 1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 27.01[4] p. 1525 summarizes how a criminal case ends in the plaintiff’s favor.

It may be necessary to instruct the jury about the elements of the criminal offense when the trial judge instructs on lack of probable cause. In *Harris v. Harris*, 542 So. 2d 284 (Ala. Civ. App. 1989), the court considered the elements of the criminal offense when reviewing the defendant’s argument that he acted in good faith.

APJI 15.01, Inference.

References

Heining v. Abernathy, 295 So. 3d 1032 (Ala. 2019), reh'g denied (2019).

Dolgencorp, LLC v. Spence, 224 So. 3d 173 (Ala. 2016).

Ex parte City of Tuskegee, 932 So. 2d 895 (Ala. 2005).

Lee v. Minute Stop, Inc., 874 So. 2d 505 (Ala. 2003).

Ex parte Tuscaloosa Cnty., 770 So. 2d 602 (Ala. 2000).

Delchamps, Inc. v. Bryant, 738 So. 2d 824 (Ala. 1999).

Huffstutler v. Edge, 254 Ala. 102, 47 So. 2d 197 (1950).

Wesson v. Wal-Mart Stores East, L.P., 38 So. 3d 746 (Ala. Civ. App. 2009).

Ravenel v. Burnett, 5 So. 3d 592 (Ala. Civ. App. 2008).

West's Key Number Digest, Malicious Prosecution Nos. ☞1 et seq.

1 Michael L Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 27.01[1] to [5] (5th ed. 2010).

Jenelle Mims Marsh, Alabama Law of Damages §§ 9:4, 36:40 (6th ed. 2012).

W. Page Keeton, et al., Prosser and Keeton on Torts § 119 (5th ed. 1984).

Am. Jur. 2d, Malicious Prosecution §§ 1 et seq.

Mark Adam Crosswhite, Abuse of Process and Malicious Prosecution in Alabama, 38 Ala. L. Rev. 99 (Fall 1986).

**APJI 24.03 TERMINATION IN PLAINTIFF'S
FAVOR—NOLLE PROSEQUI OR
DISMISSAL BASED ON
SETTLEMENT OR COMPROMISE
[PL]**

(Name of plaintiff) says the case ended in (his/her) favor because (name of defendant) had the case (not proessed/dissmissed).

(Name of defendant) says (state the charge) was (not proessed/dissmissed) as part of an agreement between (he/she/it) and (name of plaintiff) to settle the case. (Name of defendant) says the parties agreed (state the agreement).

(Name of plaintiff) denies this and says (name of defendant) (not proessed/dissmissed the charge) on (his/her/its) own.

(Name of plaintiff) must reasonably satisfy you from the evidence that the case ended in (his/her/its) favor. If the case was (not proessed/dissmissed), this is evidence that the case ended in (name of plaintiff)'s favor. But, if (name of defendant)'s evidence shows you that the (not pros/dissmissal) was part of an agreement to settle the criminal case, you will find that the case did not end in (name of plaintiff)'s favor.

Approved November 7, 2014

Notes on Use

Use this instruction only when the evidence supports the circumstances stated in the title.

If defendant's proof of settlement or compromise is unchallenged by the plaintiff, defendant is entitled to a judgment as a matter of law.

References

Rhyne v. H & B Motors, 505 So. 2d 307 (Ala. 1987).

APJI 24.03**ALABAMA PATTERN JURY INSTRUCTIONS**

Chatman v. Pizitz, Inc., 429 So. 2d 969 (Ala. 1983).

Wesson v. Wal-Mart Stores East, L.P., 38 So. 3d 746 (Ala. Civ. App. 2009).

West's Key Number Digest, Malicious Prosecution ⇨71(5).

**APJI 24.04 *PRESUMPTION*—DISCHARGED AT
PRELIMINARY HEARING—NO
INDICTMENT OR GRAND JURY
“NO-BILLED” [PL]**

There is evidence that (the district court found no probable cause/the grand jury did not indict (name of plaintiff)). This is evidence upon which you can find that (name of defendant) did not have probable cause to begin the criminal prosecution. (Name of defendant) must prove to your reasonable satisfaction from the evidence that (he/she/it) had probable cause to begin the criminal prosecution.

Approved November 7, 2014

Notes on Use

Use this instruction when the plaintiff was discharged at a preliminary hearing or the grand jury declined to indict the plaintiff or if both circumstances occurred. See, *Harris v. Harris*, 542 So. 2d 284 (Ala. Civ. App. 1989) (warrant issued for plaintiff's arrest, district attorney nol prossed at preliminary hearing, and grand jury “no-billed”).

Discharge by the district court at the preliminary hearing and/or the grand jury's “no-bill” is prima facie evidence that the defendant lacked probable cause to initiate criminal proceedings. *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 832–33 (Ala. 1999). However, the defendant is allowed to attempt to rebut this evidence by showing that he or she acted in good faith. See, *Kitchens v. Winn-Dixie Montgomery, Inc.*, 456 So. 2d 45, 47 (Ala. 1984) (district court found no probable cause for the arrest for robbery but plaintiff indicted for conspiracy to commit robbery and acquitted).

References

Delchamps, Inc. v. Bryant, 738 So. 2d 824 (Ala. 1999).

Stouts Mountain Coal Co. v. Grubb, 217 Ala. 274, 116 So. 156 (1928).

Harris v. Harris, 542 So. 2d 284 (Ala. Civ. App. 1989).

APJI 24.04

ALABAMA PATTERN JURY INSTRUCTIONS

West's Key Number Digest, Malicious Prosecution ☞24(7).

**APJI 24.05 PRESUMPTION—WARRANT—
CONVICTION IN LOWER COURT—
NOL PROS AFTER APPEAL TO
CIRCUIT COURT [PL]**

There is evidence (name of plaintiff) (was found guilty/pleaded guilty) in the (name lower court) and appealed the conviction to (name circuit court). The evidence is the charge was (nol prossed/dismissed) in the circuit court.

The conviction, by itself, allows you to presume (name of defendant) had probable cause. If (name of plaintiff) then puts on evidence that clearly overcomes the presumption, you can consider the conviction when deciding if (name of defendant) had probable cause. But the conviction, by itself, is then no longer enough for you to find (name of defendant) had probable cause.

Approved November 7, 2014

Notes on Use

Use this instruction where evidence supports the circumstances stated in the title.

References

Gunter v. Pemco Aeroplex, Inc., 646 So. 2d 1332 (Ala. 1994).

Brown v. Parnell, 386 So. 2d 1137 (Ala. 1980).

West's Key Number Digest, Malicious Prosecution ⚡24(5).

**APJI 24.06 PRESUMPTION—WARRANT—
CONVICTION IN LOWER COURT—
ACQUITTAL ON APPEAL [PL]**

There is evidence (name of plaintiff) was found guilty in (name of lower court/district court) and that (he/she) appealed the conviction to circuit court. The evidence is (he/she) was found not guilty in circuit court.

The conviction, by itself, allows you to presume (name of defendant) had probable cause. If (name of plaintiff) then puts on evidence that clearly overcomes the presumption, you can consider the conviction when deciding if (name of defendant) had probable cause. But the conviction, by itself, is then no longer enough for you to find (name of defendant) had probable cause.

The fact that (name of plaintiff) was found not guilty in circuit court is not evidence (name of defendant) lacked probable cause.

Approved November 7, 2014

Notes on Use

Use this instruction only when the evidence supports the circumstances stated in the title.

References

Jordan v. Wilson, 263 Ala. 625, 83 So. 2d 340 (1955).

Union Indemnity Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928).

**APJI 24.07 PRESUMPTION—INDICTMENT—
NOL PROSSED [PL]**

There is evidence (name of plaintiff) was indicted for (state the charge) but the district attorney (nol prossed/dismisssed) the indictment before trial.

The indictment, by itself, allows you to presume (name of defendant) had probable cause. (Name of plaintiff) has put on evidence to try to overcome the presumption. If you are reasonably satisfied that (name of plaintiff)’s evidence overcomes the presumption, you can still consider the fact (he/she) was indicted. But the fact that (name of plaintiff) was indicted, by itself, is then no longer enough for you to find (name of defendant) had probable cause.

Approved November 7, 2014

Notes on Use

Use this instruction only when the evidence supports the circumstances stated in the title.

One way the plaintiff can overcome the presumption is attack the indictment. He or she must reasonable satisfy the jury that: the defendant testified falsely before the grand jury; that the defendant or another witness failed to tell the grand jury about important information that favored the plaintiff; that the defendant got another witness to give false testimony to the grand jury or suppress important information favorable to the plaintiff; or other like conduct. *Robinson v. McPherson*, 602 So. 2d 352 (Ala. 1992).

References

Robinson v. McPherson, 602 So. 2d 352 (Ala. 1992).

Alabama Power Co. v. Neighbors, 402 So. 2d 958 (Ala. 1981). This case discusses advice of counsel (district attorney) and his investigation before taking the case to the grand jury.

West’s Key Number Digest, Malicious Prosecution ☞24(2).

**APJI 24.08 PRESUMPTION—CONVICTION
REVERSED OR VACATED ON
APPEAL—ACQUITTAL ON
RETRIAL [PL]**

There is evidence (name of plaintiff) was found guilty in circuit court but the conviction was reversed by the appeals court. The evidence is (he/she) was found not guilty when the case was retried.

The conviction, by itself, allows you to presume (name of defendant) had probable cause. If (name of plaintiff) puts on evidence that clearly overcomes the presumption, you can consider the conviction when deciding if (name of defendant) had probable cause. But the conviction, by itself, is no longer enough for you to find (name of defendant) had probable cause.

The fact that (name of plaintiff) was found not guilty when the case was retried is not evidence (name of defendant) lacked probable cause.

Approved November 7, 2014

Notes on Use

Use this instruction only when the evidence supports the circumstances stated in the title.

The instruction incorporates 24.14 (3d ed. 2013).

References

Johnson v. Haynie, 414 So. 2d 946 (Ala. 1982).

Republic Steel Corp. v. Whitfield, 260 Ala. 333, 70 So. 2d 424 (1953).

West's Key Number Digest, malicious prosecution ☞72(2).

**APJI 24.09 PRESUMPTION—WARRANT—
INDICTMENT—ACQUITTAL**

There is evidence that (name of plaintiff) was indicted but (he/she) was found not guilty at trial.

The indictment, by itself, allows you to presume (name of defendant) had probable cause. (Name of plaintiff) has put on evidence to try to overcome the presumption. If you are reasonably satisfied that (name of plaintiff)'s evidence overcomes the presumption, you can still consider the fact that (he/she) was indicted. But the fact that (name of plaintiff) was indicted, by itself, is no longer enough for you to find that (name of defendant) had probable cause.

The fact that (name of plaintiff) was found not guilty is not evidence that (name of defendant) lacked probable cause.

Approved November 7, 2014

Notes on Use

Use this instruction only when the evidence supports the circumstances stated in the title.

See APJI 24.03.

References

Lumpkin v. Cofield, 536 So. 2d 62 (Ala. 1988).

West's Key Number Digest, Malicious Prosecution ⇨24(7).

Chapter 24A

Abuse of Process [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

APJI 24A.00 Abuse of Process—Elements [PL]

Title of Instruction	Date Approved	Prior Instruction Number
24A.00 Abuse of Process—Elements	10/10/14	24A.00– 24A.04

**APJI 24A.00 ABUSE OF PROCESS—ELEMENTS
[PL]**

This is a claim for abuse of process. A person commits an abuse of process if (he/she/it) willfully uses a judicial process for a purpose the law did not intend it to be used for.

Plaintiff (name of plaintiff) says defendant (name of defendant) filed (describe the underlying claim, e. g., an unlawful detainer claim) against (name of plaintiff). (He/she/it) further says (name of defendant) did not file the claim to (e.g., to evict (him/her/it)) but filed the claim to (state the ulterior purpose). Finally, (name of plaintiff) says that (name of defendant) (state the wrongful conduct) after (he/she/it) filed the claim.

(Name of defendant) says ((he/she/it) did not abuse the process/acted in good faith).

The legal purpose of (state the underlying claim/process) is (state the legal purpose).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of defendant) had an ulterior purpose when (he/she/it) filed the (state the action or process);

An ulterior purpose is an illegal or improper purpose for which the (state the action or process) was used.

2. That after the (state the action or process) was filed, (name of defendant) willfully used the (state the action or process) to achieve an end it was not meant for. (Name of defendant) acted willfully if (he/she/it) was aware that under the circumstances (his/her/its) act(s) would harm (name of plaintiff), and (name of defendant) intended (his/her/its) act(s) to harm (name of plaintiff);

3. That (name of defendant)'s act(s) (was/were) malicious. If (name of plaintiff) proved the first two things,

you will infer that (name of defendant)'s act(s) (was/were) malicious; and,

4. (Name of defendant)'s conduct harmed (name of plaintiff).

If (name of plaintiff) proved these things, you must find for (him/her/it), and then you must determine what amount of money to award (name of plaintiff).

If (name of plaintiff) did not prove these things, you must find for (name of defendant).

Approved October 10, 2014

Notes on Use

This instruction combines and rewrites in Plain Language the instructions in Chapter 24A.00 (2013 ed.).

The defendant's good faith is a defense. *Drill Parts and Service Co., Inc. v. Joy Mfg. Co.*, 619 So. 2d 1280 (Ala. 1993); *Clikos v. Long*, 231 Ala. 424, 165 So. 394 (1936); *Dudley v. Stansberry*, 5 Ala. App. 491, 59 So. 379 (1912).

References

Hollander v. Nichols, 19 So. 3d 184 (Ala. 2009).

Moon v. Pillion, 2 So. 3d 842 (Ala. 2008).

Preskitt v. Lyons, 865 So. 2d 424 (Ala. 2003).

C.C. & J., Inc. v. Hagood, 711 So. 2d 947 (Ala. 1998).

Drill Parts and Service Co., Inc. v. Joy Mfg. Co., 619 So. 2d 1280 (Ala. 1993).

Warwick Development Co., Inc. v. GV Corp., 469 So. 2d 1270 (Ala. 1985).

Farm Country Homes, Inc. v. Rigsby, 404 So. 2d 573 (Ala. 1981).

Clikos v. Long, 231 Ala. 424, 165 So. 394 (1936).

APJI 24A.00**ALABAMA PATTERN JURY INSTRUCTIONS**

Myles v. Screentech, Inc., 98 So. 3d 563 (Ala. Civ. App. 2012).

Drees v. Turner, 45 So. 3d 350 (Ala. Civ. App. 2010).

West's Key Number Digest, Process ⌘1 et seq.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law Chapter 27 (5th ed. 2010).

Jenelle Mims Marsh, Alabama Law of Damages §§ 9:4, 36:41(6th ed. 2012).

W. Page Keeton, et al, Prosser & Keeton on Torts § 121 (5th ed. 1984).

Am. Jur. 2d Abuse of Process §§ 1 et seq.

Chapter 25

Malpractice—Medical [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 25.00 Medical Malpractice; Elements of Proof [PL]
- APJI 25.01 Standard of Care for Physician [PL]
- APJI 25.02 Standard of Care for Hospital [PL]
- APJI 25.03 Standard of Care for Healthcare Providers [PL]
- APJI 25.04 Proof of Standard of Care [PL]
- APJI 25.05 Burden of Proof—Substantial Evidence [PL]
- APJI 25.06 Duty of Doctor to Patient—Abandonment or Withdrawal [PL]
- APJI 25.07 Duty of Doctor to Patient—Alternative Methods of Treatment [PL]
- APJI 25.08 Duty of Doctor to Patient—No Guarantee of Cure [PL]
- APJI 25.09 Consent to Emergency Medical Treatment [PL]
- APJI 25.10 Informed Consent [PL]
- APJI 25.11 Fraudulent Concealment [PL]
- APJI 25.12 Implied Consent [PL]
- APJI 25.13 Duty of Hospital for Defective Instruments and Equipment [PL]
- APJI 25.14 Hospital Liability for Granting or Continuing Privileges of Health Care Provider (as Independent Contractor) [PL]
- APJI 25.15 Definition of Treatment [PL]
- APJI 25.16 Object Left in Patient—Evidence [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

Chapter 25 Conversion Chart

Title of Instruction	Third Edition Instruction Number	Second Edition Instruction Number
Medical Malpractice; Elements of Proof	25.00	25.21 (Deleted—Covered in Elements of Proof)
Standard of Care for Physician	25.01	25.00
Standard of Care for Hospital	25.02	25.07
Standard of Care for Healthcare Providers	25.03	25.09
Proof of Standard of Care	25.04	New
Burden of Proof—Substantial Evidence	25.05	New
Duty of Physician to Patient—Reliance on Other Physician	—	25.01 (Deleted—Covered in Standard of Care)
Duty of Doctor to Patient—Abandonment or Withdrawal	25.06	25.02
Duty of Physician to Patient—Error In Judgment	—	25.03 (Deleted—Covered in Standard of Care)
Duty of Doctor to Patient—Alternative Methods of Treatment	25.07	25.04
Duty of Doctor to Patient—No Guarantee of Cure	25.08	25.05
Consent to Emergency Medical Treatment	25.09	25.06
Informed Consent	25.10	25.22
Fraudulent Concealment	25.11	25.23
Implied Consent	25.12	New
Duty of Hospital for Defective Instruments and Equipment	25.13	25.08
Hospital Liability for Granting or Continuing Privileges of Health Care Provider (as Independent Contractor)	25.14	25.07a
Definition of Treatment	25.15	25.10
Object Left in Patient—Evidence	25.16	New
Damages—Elements—General Outline	—	25.11 (Deleted)
Malpractice—Non-Medical Professionals	—	25.20 (Deleted)

MALPRACTICE—MEDICAL

PREFACE

Chapter 25 contains plain language instructions on medical malpractice.

**APJI 25.00 MEDICAL MALPRACTICE;
ELEMENTS OF PROOF [PL]**

Plaintiff (name of plaintiff) says defendant (name of defendant) was a (type of health care provider) and that (he/she/name of deceased) was a patient of (name of defendant) on (date of alleged act of malpractice). (Name of plaintiff) also says that (name of defendant) caused (him/her/name of deceased) (harm/death) as a result of the failure of (name of defendant) to follow the standard of care. (Name of defendant) denies the claim of (name of plaintiff) and (insert affirmative defenses as applicable).

To recover damages on this claim (name of plaintiff) must prove to your reasonable satisfaction by substantial evidence all of the following elements:

1. The standard of care that should have been followed by (name of defendant) during the time (he/she) was responsible for the medical care of (name of plaintiff/name of deceased);
2. That (name of defendant) did not follow the standard of care in providing medical care and treatment of (name of plaintiff/name of decedent); and,
3. That the (harm/death) to (name of plaintiff/name of decedent) was probably caused by (name of defendant)'s failure to follow the standard of care.

If (name of plaintiff) proves to your reasonable satisfaction by substantial evidence each of these elements, then you should find in favor of (name of plaintiff). However, if (name of plaintiff) does not, then you should find in favor of (name of defendant).

Notes on Use

Use this as the introductory instruction to the jury to explain the necessary elements of a medical malpractice case.

If defendant has asserted any affirmative defenses, those defenses may be given to the jury at the end of the first paragraph where indicated.

This instruction may be conformed to use in those cases where the plaintiff's allegation is that the defendant failed to provide medically necessary care and treatment. For example:

Plaintiff (*name of plaintiff*) says defendant (*name of defendant*) was a (*type of health care provider*) and that (*he/she/name of deceased*) was a patient of (*name of defendant*) on (*date of alleged act of malpractice*). (*Name of plaintiff*) also says that (*name of defendant*) caused (*him/her/name of deceased*) (*harm/death*) as a result of the failure to provide necessary medical care and treatment. (*Name of defendant*) denies the claim of (*name of plaintiff*) and [*insert affirmative defenses as applicable*].

The Alabama Medical Liability Act, Ala. Code § 6-5-549 (1975) (West's Alabama Code) states: "In the case of a jury trial, the jury shall be instructed that in order to return a verdict against a health care provider, the jury shall be reasonably satisfied by substantial evidence that the health care provider failed to comply with the standard of care and that such failure probably caused the injury or death in question."

The revision to the Introductory Charge does not include instructions to the jury about the necessary qualifications of an expert under Ala. Code § 6-5-548(b) (1975) (West's Alabama Code), because the trial judge will determine whether the experts are qualified to testify as a matter of law. Ala. R. Evid. 702, Advisory Committee's Notes.

The courts have said that the question of expert qualification in medical malpractice cases is to be decided by the trial court. In *Husby v. South Alabama Nursing Home, Inc.*, 712 So. 2d 750, 753 (Ala. 1998), the Alabama Supreme Court confirmed in a medical negligence case that "the question whether a witness is qualified to give an expert opinion is customarily left to the discretion of the trial court." In *Medlin v. Crosby*, 583 So. 2d 1290, 1293 (Ala. 1991),

the Court said that “our interpretation of the statute leads us to conclude that the trial court must answer three questions before deciding whether a proffered expert witness qualifies as a “similarly situated health care provider.” The questions are: (1) What is the standard of care alleged to have been breached? (2) Is the defendant “health care provider” a specialist in the discipline or school of practice of the standard of care that the court has previously determined is alleged to have been breached? (3) Does the proffered expert witness qualify as a “similarly situated health care provider?”

Throughout these Revised Charges, the Committee has not included the terms “medical malpractice” or “negligence.” However, when it becomes necessary for the trial court to instruct the jury on the type of case, the Committee would recommend the term “medical negligence” over the term “medical malpractice,” because of the Committee’s adherence to the use of plain English in these Revised Charges. The Alabama Supreme Court has discussed “medical malpractice” as being a negligence based claim. *Lyons v. Walker Regional Medical Center, Inc.*, 868 So. 2d 1071 (Ala. 2003); *McAfee v. Baptist Medical Center*, 641 So. 2d 265, 267 (Ala. 1994).

References

Alabama Medical Liability Act of 1987, Ala. Code §§ 6-5-540 to 6-5-552 (1975) (West’s Alabama Code).

Lyons v. Walker Regional Medical Center, Inc., 868 So. 2d 1071 (Ala. 2003).

Husby v. South Alabama Nursing Home, Inc., 712 So. 2d 750 (Ala. 1998).

University of Alabama Health Services Foundation, P.C. v. Bush, 638 So. 2d 794 (Ala. 1994).

McAfee v. Baptist Medical Center, 641 So. 2d 265 (Ala. 1994).

Medlin v. Crosby, 583 So. 2d 1290 (Ala. 1991).

**APJI 25.01 STANDARD OF CARE FOR
PHYSICIAN [PL]**

The standard of care for a (type of health care provider) like (name of defendant) is that level of reasonable care, skill, and diligence as other similarly situated (type of health care provider) in the same general line of practice usually follow in same or similar cases.

Notes on Use

The Alabama Medical Liability Act, Ala. Code § 6-5-484(a) (1975) (West's Alabama Code), originally defined standard of care as "such reasonable care, diligence and skill as physicians, surgeons, and dentists in the same general neighborhood, and in the same general line of practice, ordinarily have and exercise in a like case." Following this Amendment by the Legislature, the Alabama Supreme Court held in *Zills v. Brown*, 382 So. 2d 528 (Ala. 1980), and *Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So. 2d 254 (Ala. 1982), that the "same general neighborhood" meant "the national medical neighborhood." The Alabama Medical Liability Act of 1987, § 6-5-542(2), redefined standard of care as "that level of such reasonable care, skill, diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases." The Alabama Supreme Court in *Breaux v. Thurston*, 888 So. 2d 1208 (Ala. 2003), examining a case that arose under the 1987 amendments to the Act, stated that "section 6-5-542(2), a part of the 1987 Act, parallels and expands the language of the 1975 Act." The revision to this charge was made to conform with the changes brought about by the 1987 Amendments to the Alabama Medical Liability Act.

Similarly, another part of the 1987 Amendment to the Alabama Medical Liability Act, Ala. Code § 6-5-548(a) (1975) (West's Alabama Code), states: "In an action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case."

References

Alabama Medical Liability Act of 1987, Ala. Code §§ 6-5-540 to 6-5-552 (1975) (West's Alabama Code).

Breaux v. Thurston, 888 So. 2d 1208 (Ala. 2003).

Henson v. Mobile Infirmary Ass'n, 646 So. 2d 559 (Ala. 1994).

Drs. Lane, Bryant, Eubanks & Dulaney v. Otts, 412 So. 2d 254 (Ala. 1982).

Zills v. Brown, 382 So. 2d 528 (Ala. 1980).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.02 (6th ed. 2010).

**APJI 25.02 STANDARD OF CARE FOR
HOSPITAL [PL]**

The standard of care for a hospital is that level of reasonable care, skill and diligence as other similarly situated hospitals usually follow in same or similar circumstances.

Notes on Use

See the Notes on Use under APJI 25.01.

References

See the References under APJI 25.01.

**APJI 25.03 STANDARD OF CARE FOR
HEALTHCARE PROVIDERS [PL]**

The standard of care for a (insert type of other healthcare provider) like (name of defendant), is that level of reasonable care, skill and diligence as other similarly situated (insert type of other healthcare provider) in the same general line of practice usually follow in same or similar circumstances.

Notes on Use

See the Notes on Use under APJI 25.01.

References

See the References under APJI 25.01.

**APJI 25.04 PROOF OF STANDARD OF CARE
[PL]**

(Name of plaintiff) must prove by expert testimony the standard of care, that (name of defendant) did not follow the standard of care in providing medical care and treatment of (name of plaintiff/name of decedent), and that the (harm/death) to (name of plaintiff/name of decedent) was probably caused by (name of defendant)'s failure to follow the standard of care.

Notes on Use

This charge would not be used in cases where plaintiff is not required to present expert testimony to prove his or her case.

A plaintiff must ordinarily present expert testimony to establish the standard of care and breach of the standard of care by the defendant. *Chapman v. Smith*, 893 So. 2d 293 (Ala. 2004).

The Alabama Medical Liability Act, Ala. Code § 6-5-549 (1975) (West's Alabama Code) states: "In the case of a jury trial, the jury shall be instructed that in order to return a verdict against a health care provider, the jury shall be reasonably satisfied by substantial evidence that the health care provider failed to comply with the standard of care and that such failure probably caused the injury or death in question."

The trial court determines whether the expert is qualified under the Alabama Medical Liability Act. *Medlin v. Crosby*, 583 So. 2d 1290 (Ala. 1991). *Medlin* interpreted Ala. Code § 6-5-548(b) (1975) (West's Alabama Code) and held that the trial court must answer three questions before deciding whether a proffered expert witness qualifies as a "similarly situated health care provider" within the meaning of the statute: (1) What is the standard of care alleged to have been breached? (2) Is the defendant "health care provider" a specialist in the discipline or school of practice of the standard of care that is determined to have been breached? (3) Does the proffered expert witness qualify as a "similarly situated health care provider" under the subsection determined in the second step to apply? See also *HealthTrust, Inc. v. Cantrell*, 689 So. 2d 822 (Ala. 1997); *Ex parte Waddail*, 827 So. 2d 789 (Ala. 2001).

The Supreme Court has identified exceptions to the general

rule that expert testimony is required to prove standard of care and breach of the standard of care when the plaintiff uses a recognized standard or authoritative medical text or treatise to prove standard of care, or the plaintiff is himself or herself qualified to evaluate the health care provider's allegedly negligent conduct. *Jones v. Bradford*, 623 So. 2d 1112 (Ala. 1993). Also, when the lack of care is so apparent as to be within the ken of the average layman expert testimony is not required, as when a foreign instrument is found in the plaintiff's body following surgery, the injury complained of is in no way connected to the condition for which the plaintiff sought treatment, and the nurses disregard a patient call for assistance. *Ex parte HealthSouth Corp.*, 851 So. 2d 33 (Ala. 2002). However, see *Breaux v. Thurston*, 888 So. 2d 1208 (Ala. 2003).

The charges included in Chapter 15 relating to Expert Witnesses may be useful and read with this instruction.

References

Collins v. Herring Chiropractic Center, LLC, 237 So. 3d 867 (Ala. 2017). Expert testimony is not required when the chiropractor applied frozen "cold packs" to Collins knee and the packs caused blistering and scarring.

Patton v. Thompson, 958 So. 2d 303 (Ala. 2006) (plaintiff in a medical malpractice case against a psychiatrist arising out of the suicide of the psychiatrist's patient must prove by substantial evidence that the psychiatrist breached the standard of care and that the breach probably caused the patient's death).

Chapman v. Smith, 892 So. 2d 293 (Ala. 2004).

Breaux v. Thurston, 888 So. 2d 1208 (Ala. 2003).

Ex parte Waddail, 827 So. 2d 789 (Ala. 2001).

HealthTrust, Inc. v. Cantrell, 689 So. 2d 822 (Ala. 1997).

Golden v. Stein, 670 So. 2d 904 (Ala. 1995), distinguished by *Sorrell v. King*, 946 So. 2d 854 (Ala 2001). Both cases discuss when expert witness testimony is necessary to prove causation.

Jones v. Bradford, 623 So. 2d 1112 (Ala. 1993).

Medlin v. Crosby, 583 So. 2d 1290 (Ala. 1991).

West's Key Number Digest, Health ¶821, 821(4).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.02 (6th ed. 2010).

**APJI 25.05 BURDEN OF PROOF—
SUBSTANTIAL EVIDENCE [PL]**

(Name of plaintiff) must prove each element of (his/her) claim by substantial evidence.

Substantial evidence is that character of evidence that would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.

Notes on Use

In cases where defendant health care provider has raised an affirmative defense, then it is recommended that this language be substituted for the first paragraph of this charge:

(Name of plaintiff) must prove each element of [his/her] claim by substantial evidence. (Name of defendant) has raised the defense of (insert description of defense). (Name of defendant) must prove each element of (his/her) defense by substantial evidence.

The Medical Liability Act, Ala. Code § 6-5-549 (1975) (West's Alabama Code), provides: "In the case of a jury trial, the jury shall be instructed that in order to return a verdict against a health care provider, the jury shall be reasonably satisfied by substantial evidence that the health care provider failed to comply with the standard of care and that such failure probably caused the injury or death in question."

The Medical Liability Act, Ala. Code § 6-5-542(5) (1975) (West's Alabama Code), defines substantial evidence as "that character of admissible evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed."

Cackowski v. Wal-Mart Stores, Inc., 767 So. 2d 319 (Ala. 2000), held that the defendant health care provider must prove its affirmative defense by substantial evidence also.

References

Alabama Medical Liability Act of 1987, Ala. Code §§ 6-5-542(5), 6-5-549 (1975) (West's Alabama Code).

Edgeworth v. Family Chiropractic & Health Center, P.C., 940

So. 2d 1011 (Ala. 2006) (difference between definitions of “substantial evidence” in Ala. Code § 6-5-542(5) and § 12-21-12(d) (1975) (West’s Alabama Code) is a “difference without distinction”).

Hutchins v. DCH Regional Medical Center, 770 So. 2d 49 (Ala. 2000).

Cackowski v. Wal-Mart Stores, Inc., 767 So. 2d 319 (Ala. 2000).

Ex parte Gradford, 699 So. 2d 149 (Ala. 1997).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.13 (6th ed. 2010).

**APJI 25.06 DUTY OF DOCTOR TO PATIENT—
ABANDONMENT OR WITHDRAWAL
[PL]**

Once treatment of a patient is started, a doctor should take care of (his/her) patient until treatment is no longer required. (He/she) may end the relationship before treatment is done with the mutual consent of the parties, or because the patient dismisses the doctor, or because the doctor tells the patient that (he/she) intends to withdraw and allows the patient a reasonable opportunity to find another doctor. A doctor abandons a patient when the doctor acts on his own and withdraws from the patient.

Notes on Use

This instruction may be used where one of the issues in the case is whether the doctor unilaterally abandoned the case.

References

Roberts v. Wood, 206 F. Supp. 579, 580 (S.D. Ala. 1962) (“With regard to abandonment, both plaintiff and defendant rely in their trial briefs on the authorities found in 57 A.L.R.2d 434. It is there stated that ‘To constitute an abandonment, the termination of the relationship between physician and patient must have been brought about by the unilateral act of the physician. There can be no abandonment if the relationship is terminated by mutual consent, or by the dismissal of the physician by the patient.’”)

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.02[3] (6th ed. 2010).

**APJI 25.07 DUTY OF DOCTOR TO PATIENT—
ALTERNATIVE METHODS OF
TREATMENT [PL]**

You have heard evidence in this case about different or alternative methods of treatment. If (name of defendant) had the choice of different or alternative methods of treatment and chose a method that was within the standard of care, the fact that there was a bad result because of the method used, cannot, in and of itself, be the reason to find against (him/her).

However, you can find against (name of defendant) if the method used by (him/her) was not within the standard of care, or if the method used was proper, but (name of defendant) did not follow the standard of care in carrying out that method.

Notes on Use

Use this instruction when it is contended that the method of treatment selected by the doctor is the basis for the alleged negligent conduct of defendant doctor. This instruction is to be given in conjunction with APJI 25.00 where applicable.

References

University of Alabama Health Services Foundation, P.C. v. Bush, 638 So. 2d 794 (Ala. 1994).

Sasser v. Connery, 565 So. 2d 50 (Ala. 1990).

Brackett v. Coleman, 525 So. 2d 1372, 1378 (Ala. 1988).

Otwell v. Bryant, 497 So. 2d 111, 117 (Ala. 1986).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.02[1] (6th ed. 2010).

**APJI 25.08 DUTY OF DOCTOR TO
PATIENT—NO GUARANTEE OF
CURE [PL]**

A doctor does not guarantee the success of (his/her) treatment. If (name of defendant) followed the standard of care but got a bad result, you cannot hold (him/her) responsible for (name of plaintiff/name of decedent)'s (harm/death).

Notes on Use

Do not use this instruction when there is an expressed undertaking to cure.

May be used where a doctor has several acceptable methods of treatment, and the method prescribed failed to produce the desired result.

References

Otwell v. Bryant, 497 So. 2d 111 (Ala. 1986).

Baker v. Chastain, 389 So. 2d 932 (Ala. 1980).

Moore v. Smith, 215 Ala. 592, 111 So. 918 (1927).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.02[1] (6th ed. 2010).

**APJI 25.09 CONSENT TO EMERGENCY
MEDICAL TREATMENT [PL]**

A doctor usually may not treat a patient without the consent or permission of the patient.

When the patient is unable to give permission because (he/she) is (a minor/unconscious/not in possession of his or her faculties), a doctor must obtain permission from someone authorized to give it for the patient.

EMERGENCY. When an emergency requires immediate treatment, a doctor is not required to get permission to treat the patient if it is impossible or impractical to get permission and a delay would cause harm to the patient's life or health.

EMERGENCY ARISING DURING TREATMENT. When a doctor finds medical conditions that could not reasonably have been known before the treatment, and it is impossible or impractical to obtain permission, a doctor is not required to get permission to give additional or different treatment if a delay would cause harm to the patient's life or health.

Notes on Use

The above instruction is to be used, as the circumstances dictate, where the plaintiff alleges an operation was performed on him without his consent, and defendant claims that it was an emergency, or that the plaintiff was unable to give his consent. The last two paragraphs would only need to be given when there is evidence that the plaintiff was in an emergency.

Consent may be implied from the circumstances; thus if the patient voluntarily submits to an operation, his consent will be presumed, unless he was the victim of false and fraudulent misrepresentation. *Knowles v. Blue*, 209 Ala. 27, 95 So. 481 (1923).

The Alabama Supreme Court has recognized the rule that consent to one kind of operation does not amount to consent to another and different operation. *Robinson v. Crotwell*, 175 Ala. 194, 57 So. 23 (1911).

Where the patient is too incapacitated to consent, the surgeon is justified in acting upon the consent of someone who, under the circumstances, would legally be authorized to give it. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30 (1915).

Ala. Code § 6-5-332 (1975) (West's Alabama Code), exempts from civil liability any physician who gratuitously and in good faith renders first aid or emergency care at the scene of an accident, casualty or disaster.

References

Knowles v. Blue, 209 Ala. 27, 95 So. 481 (1923).

Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915).

Robinson v. Crotwell, 175 Ala. 194, 57 So. 23 (1911).

Ala. Code § 6-5-332 (1975) (West's Alabama Code).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 17.02[4], 17.04[1], 28.04 (6th ed. 2010).

APJI 25.10 INFORMED CONSENT [PL]

A doctor may not treat a patient without (his/her) informed consent. Plaintiff (name of plaintiff) says that defendant (name of defendant) did not get the informed consent of (name of plaintiff/name of deceased) to perform the (describe the treatment); and as a result (he/she/name of deceased) was caused (harm/to die).

First, you must decide whether (name of defendant) met the standard of care by informing (name of plaintiff/name of deceased) of the material risks (of the treatment in question). A doctor is not required to inform a patient of each and every risk of (the treatment in question), but should inform the patient of the material risks. Whether a risk is “material” is to be decided by you based on the testimony of the experts.

If you decide that (name of defendant) followed the standard of care by informing (name of plaintiff/name of deceased) about the material risks (of the treatment in question) your verdict must be for (name of defendant).

However, if you decide that (name of defendant) failed to follow the standard of care by not informing (name of plaintiff/name of decedent) about the material risks (of the treatment in question), then you must decide the next question.

The next question is whether disclosure of all material risks would have changed the mind of a reasonable person in the position of (name of plaintiff/name of deceased) to have (the treatment in question) performed. The testimony of (name of plaintiff) about what (he/she) would have decided with the other information, may be considered by you in your deliberations, but it is not the only factor to be considered.

If you decide: (1) that a reasonable person in the position of (name of plaintiff/name of deceased) would not have consented to (the treatment in question); and (2) that (the treatment in question) probably caused the (harm/death),

your verdict must be for (name of plaintiff); otherwise, your verdict must be for (name of defendant).

Notes on Use

Informed consent cases require the jury to make two factual determinations.

First, the jury must determine the standard of care on the issue of informed consent. Whether the physicians had disclosed all of the material risks of the procedure was a factual issue to be resolved by the jury, and that the test for the determination of that issue was a professional one, i.e., whether the physicians had disclosed all the risks which a medical doctor practicing in the same field and in the same community would have disclosed. *Fain v. Smith*, 479 So. 2d 1150, 1152 (Ala. 1985); *Otwell v. Bryant*, 497 So. 2d 111, 117 (Ala. 1986).

Second, the jury must determine whether a failure to meet the applicable standard of care for informed consent was the proximate cause of the plaintiff's injury. For this, Alabama has adopted an objective standard. The objective standard asks the jury to determine what a prudent person in the patient's position would have decided if adequately informed of all significant perils. *Otwell v. Bryant*, 497 So. 2d 111, 117-18 (Ala. 1986); *Fain v. Smith*, 479 So. 2d 1150 (Ala. 1985); *Craig v. Borcicky*, 557 So. 2d 1253, 1258 (Ala. 1990) (The objective standard "is based on what a reasonable person in the patient's position would have done had the information been disclosed by the practitioner.").

The plaintiff still bears the burden of proving that the alleged malpractice of failing to obtain an informed consent probably caused harm to him or her. *Smith v. Medical Center East*, 585 So. 2d 1325 (Ala. 1991).

References

Phelps v. Dempsey, 656 So. 2d 377 (Ala. 1995).

Craig v. Borcicky, 557 So. 2d 1253 (Ala. 1990).

Smith v. Medical Center East, 585 So. 2d 1325 (Ala. 1991).

Otwell v. Bryant, 497 So. 2d 111, 117 (Ala. 1986)

Fain v. Smith, 479 So. 2d 1150 (Ala. 1985).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.04 (6th ed. 2010).

**APJI 25.11 FRAUDULENT CONCEALMENT
[PL]**

Plaintiff (name of plaintiff) says that (he/she) was harmed because defendant (name of defendant) hid or withheld important facts or necessary information about (here describe the alleged fraud in the medical treatment).

The relationship between a doctor and (his/her) patient is a confidential relationship. Because of that relationship, a doctor should disclose to (his/her) patient all the important facts or necessary information to give (his/her) patient the ability to control, to the extent feasible, (his/her) own health care.

To recover damages for fraudulent concealment, (name of plaintiff) must prove all of the following:

1. That (name of defendant) hid or withheld an important fact or necessary information from (name of plaintiff);
2. That (name of plaintiff) did not know of the important facts or information; and
3. That (name of plaintiff) (acted/did not act) and was harmed.

Notes on Use

The Alabama Medical Liability Act (AMLA) did not abrogate fraudulent concealment as a cause of action against a health care provider. *Johnson v. McMurray*, 461 So. 2d 775, 778 (Ala. 1984). However, the statute of limitations for bringing an action of fraudulent concealment, or any action against a health care provider, will be governed by the AMLA. *Id.*

Although silence ordinarily does not constitute fraud, in dealings between persons standing in a confidential relationship, the law, as codified in § 6-5-102, imposes an obligation on the part of the one to safeguard the interests of the other; and the withhold-

ing of material facts is a breach of that duty and constitutes actionable fraud. *Chapman v. Rivers Const. Co.*, 284 Ala. 633, 227 So. 2d 403 (1969).

A confidential relationship exists between a doctor and his patient. *Hudson v. Moore*, 239 Ala. 130, 194 So. 147 (1940), superseded by statute on other grounds, *Jett v. Wooten*, 110 So. 3d 850, 854 (Ala. 2012). The policy considerations for confidentiality in the doctor/patient relationship are grounded in the necessity on the part of the patient to fully disclose to his doctor all information essential to the patient's proper diagnosis and treatment, and in the corresponding duty on the part of the doctor to fully disclose to the patient facts necessary to enable the patient to intelligently exercise his right to control, to the extent feasible, his own health care.

References

Johnson v. McMurray, 461 So. 2d 775 (Ala. 1984).

Chapman v. Rivers Const. Co., 284 Ala. 633, 227 So. 2d 403 (1969).

Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940), superseded by statute on other grounds, *Jett v. Wooten*, 110 So. 3d 850, 854 (Ala. 2012).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 17.06 (6th ed. 2010).

APJI 25.12 IMPLIED CONSENT [PL]

A doctor may not treat a patient without (his/her) consent. If the patient knew about the treatment and its material risks and made no objection to it, then the patient may be presumed to have consented to the treatment.

Notes on Use

A patient is presumed to have consented to the operation if the patient voluntarily submits to the operation. If the patient, or the patient's authorized representative if the patient is unable to consent, knew that the operation was going to be performed and made no objection, then the patient will be presumed to have consented.

A doctor cannot compel a patient to submit to an operation; but if she voluntarily submitted to the operation, that is, knew it was about to be performed and made no objection, her consent was to be presumed, unless she was the victim of a false and fraudulent representation; this last a fact to be made reasonably clear in the evidence. *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30 (1915).

References

Wilson v. Athens-Limestone Hosp., 894 So. 2d 630 (Ala. 2004).

Wilson v. Teng, 786 So. 2d 485 (Ala. 2000).

Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915).

**APJI 25.13 DUTY OF HOSPITAL FOR
DEFECTIVE INSTRUMENTS AND
EQUIPMENT [PL]**

When a hospital provides instruments or equipment for use in treatment of patients, a hospital must use that level of reasonable care, skill and diligence as other hospitals use to see that the instruments and equipment are reasonably fit for the normal purposes and uses for which they are intended and furnished.

Notes on Use

May be used in cases where plaintiff claims that the defendant hospital negligently furnished defective instruments or equipment for use in treatment of patients and the instruments or equipment caused injury to the patient.

Claims that a hospital has provided defective equipment that occurred during the course of treatment and constitutes the medical treatment sought from the medical provider, are claims under the Alabama Medical Liability Act. See *Mobile Infirmary v. Delchamps*, 642 So. 2d 954 (Ala. 1994); *Allred v. Shirley*, 598 So. 2d 1347 (Ala. 1992). Claims that a hospital provided defective products which are provided outside the course of treatment, may not be covered by the Act. See, for example, *Skelton v. Druid City Hosp. Bd.*, 459 So. 2d 818, 39 U.C.C. Rep. Serv. 369 (Ala. 1984) (holding that hospitals may qualify as “sellers” of products they distribute under U.C.C. § 7-2-315).

References

Mobile Infirmary v. Delchamps, 642 So. 2d 954 (Ala. 1994).

Allred v. Shirley, 598 So. 2d 1347 (Ala. 1992).

Skelton v. Druid City Hosp. Bd., 459 So. 2d 818, 39 U.C.C. Rep. Serv. 369 (Ala. 1984).

**APJI 25.14 HOSPITAL LIABILITY FOR
GRANTING OR CONTINUING
PRIVILEGES OF HEALTH CARE
PROVIDER (AS INDEPENDENT
CONTRACTOR) [PL]**

(Name of plaintiff) says that defendant (name of hospital) is responsible for the (harm/death) caused to (him/her/name of deceased) because it allowed (name of health care provider) to practice at (name of hospital) when (name of health care provider) was incompetent or otherwise unfit. To recover damages for this claim (name of plaintiff) must prove to your reasonable satisfaction by substantial evidence all of the following elements:

1. That (name of health care provider) was incompetent or otherwise unfit when (name of hospital) (gave/continued to allow) (name of health care provider) privileges to practice at the hospital;
2. That (name of hospital) did not follow the standard of care when it (gave/continued to allow) (name of health care provider) privileges to practice at the hospital;
3. That (name of health care provider) did not follow the standard of care when providing medical care and treatment to (name of plaintiff/name of decedent); and
4. That (name of health care provider)'s failure to follow the standard of care probably caused the (harm/death).

Notes on Use

Use this instruction when the health care provider is granted privileges to practice and is an independent contractor.

References

- 1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 17.02[2] (5th ed. 2010).

APJI 25.15**ALABAMA PATTERN JURY INSTRUCTIONS****APJI 25.15 DEFINITION OF TREATMENT [PL]**

The word “treatment” means all the steps taken to cure an injury, illness or disease and it includes examination and diagnosis.

Notes on Use

Use this instruction in any case requiring a definition of treatment.

References

Hester v. Ford, 221 Ala. 592, 130 So. 203 (1930).

**APJI 25.16 OBJECT LEFT IN PATIENT—
EVIDENCE [PL]**

The fact that (name of defendant) did not remove the (object/instrument/device) placed in (name of plaintiff) is evidence that (name of defendant) did not meet the standard of care. (Name of defendant) put on evidence that (he/she) did meet the standard of care when (he/she) did not remove the (object/instrument/device). This creates an issue for you to decide. You must consider all the evidence and decide whether (name of defendant) either met or did not meet the standard of care when (he/she) did not remove the (object/instrument/device).

Notes on Use

Use this instruction when the plaintiff claims that the health care provider left an object, instrument, or device in the patient.

The Alabama appellate courts commonly refer to this type of case as a “retained object case.”

References

Ivy v. Carraway, 32 So. 3d 1247 (Ala. 2009).

Cobb v. Fisher, 20 So. 3d 1253 (Ala. 2009).

Sorrell v. King, 946 So. 2d 854 (Ala. 2006).

Houserman v. Garrett, 902 So. 2d 670 (Ala. 2004).

Breaux v. Thurston, 888 So. 2d 1208 (Ala. 2003).

Ravi v. Coates, 662 So. 2d 218 (Ala. 1995).

Northeast Alabama Regional Medical Center v. Robinson, 548 So. 2d 439 (Ala. 1989).

Ravi v. Williams, 536 So. 2d 1374 (Ala. 1988), abrogation recognized, Houseman v. Garrett, 902 So. 2d 670 (Ala. 2004).

Powell v. Mullins, 479 So. 2d 1119 (Ala. 1985), abrogation recognized, Houseman v. Garrett, 902 So. 2d 670 (Ala. 2004).

APJI 25.16**ALABAMA PATTERN JURY INSTRUCTIONS**

Parrish v. Spink, 284 Ala. 263, 224 So. 2d 621 (1969).

West's Key Number Digest, Health ⚙666.

1 Michael L. Roberts and Gregory S. Cusimano, Alabama Tort Law §§ 17.02[1], 17.03[1][A] (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 36:44 (6th ed. 2012).

Am. Jur. 2d, Physicians, Surgeons, and Other Healers §§ 266, 308, 310 to 313.

Chapter 25A

Legal Malpractice [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 25A.00 Legal Malpractice—Elements of Proof [PL]
- APJI 25A.01 Standard of Care for Legal Service Provider [PL]
- APJI 25A.02 Standard of Care for Legal Specialist [PL]
- APJI 25A.03 Standard of Care—Limited Scope of Services [PL]
- APJI 25A.04 Legal Malpractice—Statute of Limitations—
Occurrence Rule [PL]

Title of Instruction	Date Approved	Prior Instruction Number
Legal Malpractice—Elements of Proof	25A.00	25A.00 and 25A.06
Standard of Care for Legal Service Provider	25A.01	25A.01
Standard of Care for Legal Specialist	25A.02	25A.02
Standard of Care—Limited Scope of Services	25A.03	25A.03
Legal Malpractice—Statute of Limitations—Occurrence Rule	25A.04	25A.04

PREFACE

The Committee deleted existing APJI 25A.03 (2d ed. 1993), No Guarantee of Results, because it is an argumentative instruction.

The Committee deleted APJI 25A.05 and APJI 25A.06 because there is one cause of action against a legal service provider, and the action is under the Alabama Legal Services Liability Act.

**APJI 25A.00 LEGAL MALPRACTICE—
ELEMENTS OF PROOF [PL]****Ala. Code §§ 6-5-570 to 6-5-581 (1975) (West's Alabama
Code)**

Plaintiff (name of plaintiff) says defendant (name of defendant) represented (name of plaintiff) in a legal matter (describe the representation, e. g., litigation, business transaction, before an administrative agency, etc.). (Name of plaintiff) further says (name of defendant)'s representation did not meet the standard of care required of lawyers in the situation, and because it didn't, (name of plaintiff) says (he/she/it) got a less favorable result than (he/she/it) should have gotten in the (case/transaction).

(Name of defendant) says (his/her/its) work met the standard of care (and state any affirmative defenses).

To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all the following:

1. That (he/she/it) had a client-lawyer relationship with (name of defendant);
2. That the standard of care that (name of defendant) should have followed when (he/she) represented (name of plaintiff) required (name of defendant) to (specify what the standard of care required the lawyer to do or not to do);
3. That (name of defendant) did not follow the standard of care and (his/her) failure caused (specify the bad result or outcome); and,
4. That but for (name of defendant)'s failure to follow the standard of care, (name of plaintiff) would have gotten a better result or outcome (specify the better result or outcome).

If (name of plaintiff) proves all these things, you must find for (him/her/it), and then you must determine the

amount of money to award (name of plaintiff). If (name of plaintiff) did not prove all these things, you must find for (name of defendant).

Notes on Use

The “sole” claim against a legal service provider by the former client is for breach of the standard of care as defined in the Alabama Legal Services Liability Act (ALSLA). 1988 Ala. Acts 262, codified at Ala. Code §§ 6-5-570 to 6-5-581 (1975) (West’s Alabama Code). *Free v. Lasseter*, 31 So. 3d 85, 89 (Ala. 2009).

This instruction states the elements of a legal negligence claim against a lawyer. Because law clerks, paralegals, legal assistants, etc., can be sued under ALSLA, Ala. Code § 6-5-572(2) (1975) (West’s Alabama Code), the user must modify this instruction to fit those claims.

See APJI 10.01 to 10.07, Contracts.

References

Ala. Code §§ 6-5-570 to 6-5-581 (1975) (West’s Alabama Code).

Bond v. McLaughlin, 229 So. 3d 760 (Ala. 2017).

Cockrell v. Pruitt, 214 So. 3d 324 (Ala. 2016). Attorney’s false statement about the status of plaintiff’s claim is actionable under the Legal Services Liability Act as a claim separate from plaintiff’s claim against the attorney for his failure to timely file a complaint on the underlying claim.

Free v. Lasseter, 31 So. 3d 85, 89 (Ala. 2009). “[T]he *sole* cause of action against a legal-service provider by that provider’s former client is for ‘breach of the standard of care,’ which is defined as ‘[t]he failure by a legal service provider to comply with the applicable standard of care the breach of which proximately causes the injury or damage [] or wrongful death.’ § 6-5-572(4).” (emphasis in original).

Bonner v. Lyons, Pipes & Cook, P.C., 26 So. 3d 1115, 1120 (Ala. 2009) (per curiam). “To prevail in a legal malpractice action, the plaintiff must prove that, but for the attorney’s negligence, the legal matter would have been resolved more favorably to the plaintiff. *Pickard v. Turner*, 592 So.2d 1016, 1019 (Ala. 1992). To

meet this burden, the plaintiff must prove (1) that, in the absence of the alleged malpractice, the plaintiff would have been entitled to a more favorable result in the legal matter which the attorney is alleged to have been negligent, and (2) that the attorney's negligence in fact caused the outcome of the legal matter to be less favorable to the plaintiff than the outcome would have been in the absence of the alleged malpractice." The plaintiff must prove the same basic elements that must be proved in a negligence action: duty, breach, proximate cause, and damages, *Id* at 11. Additionally, the plaintiff must prove "but for" causation.

Line v. Ventura, 38 So. 3d 1, 11 (Ala. 2009). *Smith v. Math*, 984 So. 2d 1179, 1185–88 (Ala. Civ. App. 2007). A claim under the ALSLA is based on the fact that a lawyer provided legal services to the plaintiff. Put another way, the claim is based on the plaintiff's receipt of legal services.

Brackin v. Trimmier Law Firm, 897 So. 2d 207, 229 (Ala. 2004). "An attorney client relationship is an essential element of a claim under the Legal Services Liability Act,"

Sessions v. Espy, 854 So. 2d 515, 522 (Ala. 2002). *Shows v. NCNB Nat'l. Bank of North Carolina*, 585 So. 2d 880, 882 (Ala. 1991). A duty under the ALSLA may be one undertaken by contract or gratuitously.

Board of Com'rs of Alabama State Bar v. Jones, 291 Ala. 371, 281 So. 2d 267 (1973). *Bryant v. Robledo*, 938 So. 2d 413 (Ala. Civ. App. 2005). There must be a contract of employment to create an attorney client relationship, and the contract can be express or implied. But cf., *Green v. Montgomery County, Ala.*, 784 F. Supp. 841, 845–48 (M.D. Ala. 1992) (preliminary phone conversation between Green and lawyer was sufficient to create fiduciary relationship that required disqualification of that lawyer when he undertook to represent opposing party).

Terry Cove North, Inc. v. Marr & Friedlander, P.C., 521 So. 2d 22 (Ala. 1988). A client does not have a private cause of action based on a breach of a disciplinary rule of the Code of Professional Conduct.

Guyton v. Hunt, 61 So. 3d 1085 (Ala. Civ. App. 2010).

West's Key Number Digest, Attorney & Client ⇨22, 63, 64, 69, 70, 76, 105.5 to 129.5.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 18.01 to 18.05 (5th ed. 2010).

Ally Windsor Howell, *Alabama Personal Injury & Torts* § 8:3 (2012 Ed.).

1 Ronald E. Mallan and Jeffrey M. Smith, *Legal Malpractice* §§ 8.2, 8.3, 8.4 (5th ed. 2000).

5 Ronald E. Mallan and Jeffrey M. Smith, *Legal Malpractice* §§ 33.1 to 33.32 (5th ed. 2000).

Jennelle M. Marsh, *Alabama Law of Damages* § 36:44 (6th ed. 2012).

Supreme Court of Alabama Order (March 26, 2012) adopting rules relating to limited scope representation.

Am. Jur. 2d, *Attorneys at Law* §§ 137 to 186, 201 to 226.

Restatement Third of The Law Governing Lawyers § 14 (2000).

Max Cassady, *Alleged Involuntary Attorney—Client Relationships and Attendant Statute of Limitations*, 73 Ala. Law. 50 (Jan. 2012).

W. Michael Atchison and Robert P. Mackenzie, *Nine Ways to Avoid a Suit for Legal Malpractice*, 65 Ala. Law. 242 (July 2004).

W. Michael Atchison and Robert P. Mackenzie, *The Professional Liability of Attorneys in Alabama*, 30 Cumb. L. Rev. 453 (1999–2000).

Andrew W. Martin, Jr., *Comment, Legal Malpractice: Negligent Referral as a Cause of Action*, 29 Cumb. L. Rev. 679 (1998–1999).

APJI 25A.01 STANDARD OF CARE FOR LEGAL SERVICE PROVIDER [PL]**Ala. Code § 6-5-572(3)(a) (1975) (West's Alabama Code)**

The standard of care for a (type of legal service provider) is that level of reasonable care, skill, and diligence as other similarly situated (type of legal service providers) in the same general line of practice and in the same general locality or area ordinarily have and use in the same or similar circumstances.

Notes on Use

The standard of care is defined in the ALSLA. Use this instruction when the legal service provider does not “publish the fact that he or she is certified as a specialist in an area of the law” or the legal service provider does not “solicit business by publically advertising as a specialist in an area of the law,” Section 6-5-572(3)(b). Use APJI 25A.02 if the legal service provider meets the criteria of § 6-5-572(3)(b).

References

Ala. Code § 6-5-572(3)(a) (1975) (West's Alabama Code).

Mylar v. Wilkinson, 435 So. 2d 1237 (Ala. 1983).

West's Key Number Digest, Attorney & Client ⇌107.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 18.02, 18.03 (5th ed. 2010).

3 Ronald E. Mallan and Jeffrey M. Smith, *Legal Malpractice* §§ 19:1 to 19:10 (5th ed. 2000).

5 Ronald E. Mallan and Jeffrey M. Smith, *Legal Malpractice* §§ 33:15 to 33:17 (5th ed. 2000).

APJI 25A.02 STANDARD OF CARE FOR LEGAL SPECIALIST [PL]**Ala. Code § 6-5-572(3)(b) (1975) (West's Alabama Code)**

The standard of care for (type of legal specialist) is that level of reasonable care, skill, and diligence as other (type of legal specialists) practicing as a specialist in the same area of the law in the same general locality or area ordinarily have and use in the same or similar circumstances.

Notes on Use

This instruction assumes the legal service provider is a legal specialist. If the issue is disputed, the instruction must be modified to include the language in § 6-5-572(3)(b) that instructs the jury how it will determine if the legal service provider is, in fact, a legal specialist.

References

Ala. Code § 6-5-572(3)(b) (1975) (West's Alabama Code).

Mylar v. Wilkinson, 435 So. 2d 1237 (Ala. 1983).

West's Alabama Digest 2d, Attorney & Client Key No. 107.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 18.02, 18.03 (5th ed. 2010).

3 Ronald E. Mallan and Jeffrey M. Smith, Legal Malpractice §§ 19:1 to 19:10 (5th ed. 2000).

5 Ronald E. Mallan and Jeffrey M. Smith, Legal Malpractice §§ 33:15 to 33:17 (5th ed. 2000).

**APJI 25A.03 STANDARD OF CARE—LIMITED
SCOPE OF SERVICES [PL]**

The (type of legal services provider) and client can agree to limit the objectives and scope of services that (type of legal services provider) will provide the client. When they do, the standard of care for (type of legal services provider) is that level of reasonable care, skill, and diligence as other similarly situated (type of legal services providers) who provide similar services in the same general line of practice in the same general locality or area have and use in the same or similar circumstances.

Notes on Use

Use this instruction when the client and lawyer have agreed to limit the scope of objectives or services. One example is local counsel who is subordinate to a lead or primary lawyer. See Alabama Rules of Professional Conduct 1.2. Another and more recent example is the March 26, 2012 order of the Alabama Supreme Court that adopted limited scope of representation rules. The user should refer to the order and appendices to the order.

References

Ex parte Central States Health and Life Co. of Omaha, 594 So. 2d 80 (Ala. 1992).

Wilson v. Brooks, 369 So. 2d 1221 (Ala. 1979).

West's Key Number Digest, Attorney & Client ⇐107.

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 18.01 to 18.05 (5th ed. 2010).

3 Ronald E. Mallan and Jeffrey M. Smith, Legal Malpractice §§ 19:1 to 19:10 (5th ed. 2000).

5 Ronald E. Mallan and Jeffrey M. Smith, Legal Malpractice §§ 33:15 to 33:17 (5th ed. 2000).

Supreme Court of Alabama Order (March 26, 2012) adopting rules relating to limited scope representation.

**APJI 25A.04 LEGAL MALPRACTICE—
STATUTE OF LIMITATIONS—
OCCURRENCE RULE [PL]**

Ala. Code § 6-5-574 (1975) (West's Alabama Code)

The law requires that (name of plaintiff) must have filed this lawsuit within two years after (name of defendant)'s conduct may have caused the harm (name of plaintiff) claims.

(Name of defendant) says (name of plaintiff) must have filed this lawsuit by (date) because (state defendant's reason(s)). The lawsuit was filed (date).

(Name of defendant) must reasonably satisfy you from the evidence that (name of plaintiff) did not file the lawsuit within the two year time limit. If (he/she/it) proved this, you must find for (name of defendant).

(The Discovery Rule)

Even if (name of defendant) proves (name of plaintiff) did not file the lawsuit within the two year period, it is timely filed if it is filed within the time period allowed under the discovery rule.

(Name of plaintiff) says (he/she/it) did not discover and could not have reasonably discovered (name of defendant)'s wrongful conduct because (state the reason(s)).

You will find it was filed in time if (name of plaintiff) proves three things.

(Name of plaintiff) must prove to your reasonable satisfaction from the evidence that:

1. (He/she/it) did not discover and could not have reasonably discovered within the two year time period facts that showed (name of defendant)'s wrongful conduct may have caused the harm (name of plaintiff) claims;

2. (He/she/it) filed the lawsuit within six months from

the date (he/she/it) discovered that (name of defendant)'s wrongful conduct may have caused the harm (name of plaintiff) claims; or,

(he/she/it) filed the lawsuit within six months from the date (he/she/it) discovered facts which would have reasonably led to the discovery that (name of defendant)'s wrongful conduct may have caused the harm (name of plaintiff) claims; and,

3. (Name of plaintiff) filed the lawsuit by the earlier date.

If (name of plaintiff) proved these things you will find (name of plaintiff) timely filed the lawsuit.

Approved May 6, 2016

Notes on Use

There is a split of authority on when a cause of action accrues under the Alabama Legal Services Liability Act (ALSLA). One line of authority is the statute runs from the date of the lawyer's act or omission (wrongful conduct), and this is the "occurrence" rule or approach. The other line of authority is the claim accrues when the plaintiff's injury occurs, and this is the "accrual" rule or approach. Three cases summarize the history about the split of authority: *Ex parte Panell*, 756 So. 2d 862 (Ala. 1999) (plurality opinion); *Ex parte Seabolt*, 782 So. 2d 212 (Ala. 2000); and *Denbo v. DeBray*, 968 So. 2d 983 (Ala. 2006). This instruction states the occurrence rule or approach.

The instruction must be modified if the plaintiff claims the lawyer fraudulently concealed the cause of action and invokes § 6-2-3. Section 6-2-3 applies to Alabama Legal Service Liability Act claims. *Jett v. Wooten*, 110 So. 3d 850 (Ala. 2012).

Section 6-5-574(b) states the time limit for filing a claim under the ALSLA "shall be subject to all existing provisions of law relating to the computation of statutory periods of limitations for the commencement of actions," and it specifies the code sections. A plaintiff cannot invoke a code section that might otherwise toll the

running of the statute of limitations if that code section is not specified in § 6-5-574(b). *Jones v. Blanton*, 644 So. 2d 882 (Ala. 1994).

Section 6-5-574(b) states “no action shall be commenced more than four years after the act, omission, or failure complained of.” And, a minor under four years old “shall have until his or her eighth birthday to commence such action.”

References

Ala. Code § 6-5-574 (1975) (West’s Alabama Code).

Ex parte Edwards, 299 So. 3d 238 (Ala. 2020).

Belle v. Goldasich, 295 So. 3d 18 (Ala. 2019) (plurality).

Jett v. Wooten, 110 So. 3d 850 (Ala. 2012).

Denbo v. DeBray, 968 So. 2d 983 (Ala. 2006).

Dennis v. Northcutt, 887 So. 2d 219 (Ala. 2004).

Ex parte Seabol, 782 So. 2d 212 (Ala. 2000).

Ex parte Panell, 756 So. 2d 862 (Ala. 1999) (plurality opinion).

Jones v. Blanton, 644 So. 2d 882 (Ala. 1994).

Brewer v. Davis, 593 So. 2d 67 (Ala. 1991).

West’s Key Number Digest, Attorney & Client ⇨55(2), 95(11), 100(11), 100(12), 104, 129(1).

West’s Key Number Digest, Limitation of Actions ⇨55(3), 95(1) to (3), 98, 99, 99(1).

Jenelle Mims Marsh, *Alabama Law of Damages* § 11:26 (6th ed. 2012).

1 Ally Windsor Howell, *Alabama Personal Injury & Torts* § 3:4 (2014 ed.).

3 Ronald E. Mallen, et al, *Legal Malpractice* §§ 23:1, 23:14, 23:18, 23:21, 23:22, 23:23 to 23:71.

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 18.06 (5th ed. 2010).

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Am. Jur. 2d, Attorneys at Law §§ 227 to 230.

Commentary, A Fox Guarding the Henhouse: A Comment on Ex parte Panell, 52 Ala. L. Rev. 743 (Winter, 2011).

Chapter 26

Motor Vehicles [PL]

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

- APJI 26.00 Duty Owed by Driver of Motor Vehicle [PL]
- APJI 26.01 Driver's Duty—Vision Impaired [PL]
- APJI 26.02 Driver's Duty to Blind Pedestrian [PL]
- APJI 26.03 Driver's Duty to Young Child [PL]
- APJI 26.04 Driver's Duty to Keep Lookout [PL]
- APJI 26.05 Driver's Duty to Paying Passenger [PL]
- APJI 26.06 Driver's Duty to Guest [PL]
- APJI 26.07 Driver's Duty to Trespasser [PL]
- APJI 26.08 Assumption Others Will Obey the Law [PL]
- APJI 26.09 Sudden Emergency
- APJI 26.10 Negligent Entrustment of Motor Vehicle [PL]
- APJI 26.11 Presumption—Entrustment
- APJI 26.12 Driver's Negligence Imputed to Passenger [PL]
- APJI 26.13 Driver's Wantonness Imputed to Passenger [PL]
- APJI 26.14 Presumption—Ownership of Vehicle
- APJI 26.15 Presumption—Owner Present in Vehicle
- APJI 26.16 Driving Employer's Vehicle [PL]
- APJI 26.17 to 26.20 Reserved
- APJI 26.21 Violation of Rule of the Road or Municipal Traffic Ordinance—Negligence Per Se [PL]
- APJI 26.22 Violation of Rule of the Road or Municipal Traffic Ordinance—Prima Facie Evidence of Negligence [PL]
- APJI 26.23 Contributory Negligence—Violation of Rule of the Road or Municipal Traffic Ordinance [PL]
- APJI 26.24 Contributory Negligence—Passenger or Guest Failure to Keep Lookout [PL]
- APJI 26.25 Contributory Negligence—Passenger—Negligent, Reckless or Incompetent Driver [PL]

ALABAMA PATTERN JURY INSTRUCTIONS

- APJI 26.26 Driver's Negligence Imputed to Passenger Affirmative Defense [PL]
- APJI 26.27 Failure to Wear Seat Belt Not Contributory Negligence [PL]
- APJI 26.28 Skidding [PL]
- APJI 26.29 to 26.33 Reserved
- APJI 26.34 Guest Statute—Affirmative Defense—Ala. Code § 32-1-2 (1975) (West's Alabama Code) [PL]
- APJI 26.35 Guest Statute—Misrepresentation [PL]
- APJI 26.36 Guest Statute—Protest of Guest [PL]
- APJI 26.37 Guest Statute—Consent Child Under Fourteen Years Old [PL]
- APJI 26.38 Driver's Sudden Loss of Consciousness—Affirmative Defense [PL]
- APJI 26.39 Mechanical Defect—Affirmative Defense [PL]
- APJI 26.40 Police Officer—Negligent Pursuit [PL]
- APJI 26.41 Police Officer—Negligent Failure to End Pursuit [PL]
- APJI 26.42 Police Officer—Wanton Failure to End Pursuit [PL]

Title of Instruction	Current Instruction Number	Prior Instruction Number
Duty Owed by Driver of Motor Vehicle	26.00	26.00
Driver's Duty—Vision Impaired	26.01	26.21
Driver's Duty to Blind Pedestrian	26.02	26.09
Driver's Duty to Young Child	26.03	26.27
Driver's Duty to Keep Lookout	26.04	26.08
Driver's Duty to Paying Passenger	26.05	26.02
Driver's Duty to Guest	26.06	26.01
Driver's Duty to Trespasser	26.07	26.03
Assumption Others Will Obey the Law	26.08	26.15
Sudden Emergency	26.09	26.10
Negligent Entrustment of Motor Vehicle	26.10	26.16
Presumption—Entrustment	26.11	New
Driver's Negligence Imputed to Passenger	26.12	26.17
Driver's Wantonness Imputed to Passenger	26.13	26.18

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Title of Instruction	Current Instruction Number	Prior Instruction Number
Presumption—Ownership of Vehicle	26.14	26.13
Presumption—Owner Present in Vehicle	26.15	26.31
Driving Employer's Vehicle	26.16	26.30
RESERVED	26.17–26.20	
Violation of Rule of The Road or Municipal Traffic Ordinance—Negligence Per Se	26.21	26.11
Violation of Rule of The Road or Municipal Traffic Ordinance—Prima Facie Evidence of Negligence	26.22	26.12
Contributory Negligence—Violation of Rule of the Road or Municipal Traffic Ordinance	26.23	26.19
Contributory Negligence—Passenger or Guest—Failure to Keep Lookout	26.24	26.06
Contributory Negligence—Passenger—Negligent, Reckless, or Incompetent Driver	26.25	26.14
Driver's Negligence Imputed to Passenger—Affirmative Defense	26.26	New
Failure to Wear Seat Belt Not Contributory Negligence	26.27	26.28, 2011 Cum. Supp.
Skidding	26.28	26.29, 2011 Cum. Supp.
RESERVED	26.29–26.33	
Guest Statute—Affirmative Defense	26.34	26.04, 26.05, 26.07
Guest Statute—Misrepresentation	26.35	26.25
Guest Statute – Protest of Guest	26.36	26.26
Guest Statute—Consent—Child Under 14 Years Old	26.37	New
Driver's Sudden Loss of Consciousness—Affirmative Defense	26.38	26.22
Mechanical Defect—Affirmative Defense	26.39	26.14
Police Officer—Negligent Pursuit	26.40	26.20

ALABAMA PATTERN JURY INSTRUCTIONS

Title of Instruction	Current Instruction Number	Prior Instruction Number
Police Officer—Negligent Failure to End Pursuit	26.41	New
Police Officer—Wanton Failure to End Pursuit	26.42	New

**APJI 26.00 DUTY OWED BY DRIVER OF
MOTOR VEHICLE [PL]**

The driver of a motor vehicle must use reasonable care not to cause harm to others using the public roadway.

Notes on Use

Use this instruction when it is necessary to explain a vehicle driver's duty.

See, APJI 28.01, Negligence—Definition.

References

Jones v. Baltazar, 658 So. 2d 420 (Ala. 1995).

Barber Pure Milk Co. v. Holmes, 264 Ala. 45, 84 So. 2d 345 (1955).

Pike Taxi Co. v. Patterson, 258 Ala. 508, 63 So. 2d 599 (1952).

Tindell v. Guy, 243 Ala. 535, 10 So. 2d 862 (1942).

West's Key Number Digest, Automobiles ⌘146.

**APJI 26.01 DRIVER'S DUTY—VISION
IMPAIRED [PL]**

When (sunlight, fog, rain, etc.) keeps a driver from seeing what is on or in the road ahead, (he/she) must operate (his/her) vehicle in a way that is reasonable in these conditions.

Notes on Use

Use this instruction as appropriate.

References

Jefferson County v. Sulzby, 468 So. 2d 112 (Ala. 1985).

Holley v. Josey, 263 Ala. 349, 82 So. 2d 328 (1955).

Engel v. Davis, 256 Ala. 661, 57 So. 2d 76 (1952).

Small ex rel. Small v. Bradley, 825 So. 2d 850 (Ala. Civ. App. 2002).

Ball v. Sears, Roebuck & Co., 223 F.2d 695 (5th Cir. 1955).

West's Key Number Digest, Automobiles ⇨168(9).

Am. Jur. 2d, Automobiles and Highway Traffic §§ 761, 767, 769, 772, 774 to 779.

**APJI 26.02 DRIVER'S DUTY TO BLIND
PEDESTRIAN [PL]**

The emblem or sign of a blind, partially blind, or incapacitated person is a white cane or a guide dog.

The driver of a vehicle must yield the right-of-way to such person carrying a clearly visible white cane or accompanied by a guide dog.

Notes on Use

Use this instruction to instruct on a driver's duty to a blind person.

References

Ala. Code § 32-5A-220 (1975) (West's Alabama Code).

Ala. Code § 32-5A-213 (1975) (West's Alabama Code).

**APJI 26.03 DRIVER'S DUTY TO YOUNG CHILD
[PL]**

When a young child is near a roadway, a driver who sees the child cannot assume the child will not suddenly run into the roadway. The driver must watch the child's movements and do what a reasonably prudent driver would do in this situation not to harm the child.

Notes on Use

Use this instruction in the appropriate case.

References

Clayton ex rel. Clayton v. Fargason, 730 So. 2d 160 (Ala. 1999).

Jefferson v. Fleming, 669 So. 2d 870 (Ala. 1995).

Hayles v. Johnson, 366 So. 2d 260 (Ala. 1978).

Howell v. Roueche, 263 Ala. 83, 81 So. 2d 297 (1955).

Rodgers v. Turberville, 29 So. 3d 224 (Ala. Civ. App. 2009).

West's Key Number Digest, Automobiles ¶162.

Ala. Code § 32-5A-213 (1975) (West's Alabama Code).

**APJI 26.04 DRIVER'S DUTY TO KEEP
LOOKOUT [PL]**

A driver must keep a lookout for others, and (he/she) must use reasonable care to anticipate the presence of others.

A driver is negligent (contributorily negligent) if (he/she) fails to see what was there to be seen or otherwise fails to discover a vehicle (person) that (he/she) should have discovered in time to avoid hitting (him/her/it).

Notes on Use

Use this instruction when the claim or defense is the driver did not keep a lookout.

The duty to keep a lookout is a common law duty to use reasonable care and it is not a duty imposed by the rules of the road. See, *Williams v. Roche Undertaking Co.*, 255 Ala. 56, 49 So. 2d 902 (1950) (collisions on public right of way in a cemetery); *Smith v. Clemmons*, 216 Ala. 52, 112 So. 442 (1927) (car hit horse on private road); *Dale v. Kelly*, 620 So. 2d 632, 633–34 (Ala. 1993) (collision in private parking lot).

The last paragraph of APJI 26.08 (2d ed. 1993) is deleted from this instruction because it is misplaced. However, it is revised here, as follows: A driver is negligent (contributory negligent) if (he/she) sees a vehicle (person) in a dangerous situation on the highway and does not use reasonable care to avoid the harm.

References

Serio v. Merrell, Inc., 941 So. 2d 960 (Ala. 2006).

Hood v. Murray, 547 So. 2d 75 (Ala. 1989).

Brown v. Billy Marlar Chevrolet, Inc., 381 So. 2d 191 (Ala. 1980).

Holley v. Josey, 263 Ala. 349, 82 So. 2d 328 (1955).

Pike Taxi Co. v. Patterson, 258 Ala. 508, 63 So. 2d 599 (1952).

Cooper v. Agee, 222 Ala. 334, 132 So. 173 (1930), overruled on

APJI 26.04**ALABAMA PATTERN JURY INSTRUCTIONS**

other grounds, *Simpson v. Glenn*, 264 Ala. 519, 522, 88 So. 2d 326, 328 (1956).

Miller v. Cleckler, 51 So. 3d 379 (Ala. Civ. App. 2010).

Fedonczak v. Grissom, 2011 WL 344130 (M.D. Ala. 2011) (not reported).

West's Key Number Digest, Automobiles ¶150.

Am. Jur. 2d, Automobiles and Highway Traffic § 422.

1 Ally W. Howell, *Alabama Personal Injury and Torts* § 5:21 (2012 ed.).

**APJI 26.05 DRIVER'S DUTY TO PAYING
PASSENGER [PL]**

The driver of a vehicle must use reasonable care not to harm a paying passenger in the vehicle.

The words reasonable care mean the care a reasonably prudent person would use in a similar situation.

Notes on Use

Use this instruction to instruct on the duty the driver owes a paying passenger.

See APJI 26.34 for the definition of paying passenger.

References

See references in APJI 26.34.

APJI 26.06 DRIVER'S DUTY TO GUEST [PL]

The driver of a vehicle must not wantonly or willfully harm a guest passenger in the vehicle.

The driver is not responsible for harm caused by (his/her) negligent conduct.

Notes on Use

Use this instruction to instruct on the duty the driver owes a guest in the vehicle.

Guest is defined in APJI 26.34.

References

See references to APJI 26.34.

**APJI 26.07 DRIVER'S DUTY TO TRESPASSER
[PL]**

The driver (owner) of a vehicle must not wantonly or willfully harm a trespasser who is on or in the vehicle.

The driver (owner) must use reasonable care to not harm a trespasser when the driver (owner) knows that a trespasser is on or in the vehicle and knows (he/she) is in a dangerous position.

Notes on Use

Use this instruction when the passenger is on or in a vehicle without the driver's or owner's permission.

Slaughter ex rel. Foster v. Moncrief, 758 So. 2d 1102 (Ala. Civ. App. 1999) involves a four year old child trespasser who fell from the bed of a pickup truck parked on the defendants' land. Moncrief applies the analysis first used in Tolbert v. Gulsby, 333 So. 2d 129 (Ala. 1976).

See, APJI 29.00, Wantonness—Defined.

See, APJI 29.01, Willful Conduct.

See, APJI 29.02, Principal Responsible for Agent's Wanton Conduct.

References

Roberts Const. Co. v. Brown, 272 Ala. 440, 131 So. 2d 710 (1961).

Harper v. Griffin Lumber Co., 250 Ala. 339, 34 So. 2d 148 (1948).

Birmingham Ice & Cold Storage Co. v. Alley, 247 Ala. 503, 25 So. 2d 37 (1945).

Jewel Tea Co. v. Sklivis, 231 Ala. 590, 165 So. 824 (1936).

Perry Supply Co. v. Brown, 221 Ala. 290, 128 So. 227 (1930).

McGhee v. Birmingham News Co., 206 Ala. 487, 90 So. 492 (1921).

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West's Key Number Digest, Automobiles ¶4.

1 Ally W. Howell, Alabama Personal Injury and Torts § 5:29
(2012 ed.).

Am. Jur. 2d, Automobiles and Highway Traffic § 520.

**APJI 26.08 ASSUMPTION OTHERS WILL OBEY
THE LAW [PL]**

A driver has the right to assume that other persons using the highway or street will obey the traffic laws. (He/she) has the right to act on that assumption unless it is clear, or by using reasonable care it should be clear, that the other person will not obey the traffic laws.

Notes on Use

This instruction is a general statement of law; however, it is subservient to the principle that a motorist, passenger, or pedestrian must always use reasonable care under the circumstances. *Yeager v. Miller*, 286 Ala. 380, 240 So. 2d 221 (1970). Additionally, a motorist is required by Ala. Code § 32-5A-213 (1975) (West's Alabama Code) to use "proper caution upon observing any child or any obviously confused, incapacitated or intoxicated person."

The court should give the instruction in the context of the facts and the party's contentions. For example, "Kelly had a right to assume that Smith would not try to pass her vehicle on a double yellow line." *Kelley v. Smith*, 581 So. 2d 1096 (Ala. 1991).

References

Kelley v. Smith, 581 So. 2d 1096 (Ala. 1991).

Yeager v. Miller, 286 Ala. 380, 240 So. 2d 221 (1970).

Waddell v. Crescent Motors, 260 Ala. 124, 69 So. 2d 414 (1953).

Smith v. Kifer, 36 Ala. App. 79, 52 So. 2d 399 (1951).

West's Key Number Digest, Automobiles ⇨206; Negligence ⇨194(15).

APJI 26.09

ALABAMA PATTERN JURY INSTRUCTIONS

APJI 26.09 SUDDEN EMERGENCY

See Negligence—Simple, APJI 28.10.

**APJI 26.10 NEGLIGENT ENTRUSTMENT OF
MOTOR VEHICLE [PL]**

Plaintiff (name of plaintiff) says (he/she) was harmed because defendant (name of defendant) negligently entrusted (describe the motor vehicle, e.g., car, truck, four wheeler, motorcycle, etc.) to (name the entrustee) and (describe the conduct of the entrustee). To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1. (Name of defendant) (owned) (had custody or control) of the (car, truck, etc.);

2. (Name of defendant) did entrust it to (name of entrustee);

3. (Name of entrustee) was incompetent to operate the (car, truck, etc.);

4. (Name of defendant) knew or by using reasonable care should have known that (name of entrustee) was incompetent (state why the entrustee is claimed to be incompetent); and,

5. (Name of plaintiff) was harmed because of (name of entrustee)'s incompetence.

Entrust: (Name of defendant, entrustor) entrusts (name of entrustee) with (name the article or instrumentality) when by words or conduct (he/she) gives permission to use the (car, truck, etc.).

Incompetent: A person is incompetent if (he/she) is likely to use (name article or instrumentality) in a manner involving unreasonable risk of harm to (himself/herself) or others.

If (name of plaintiff) proves all these things you must find for (him/her) and determine what amount of money to award (him/her). If (name of plaintiff) does not prove all these things, you must find for (name of defendant).

Notes on Use

Use this instruction when plaintiff claims the defendant negligently entrusted a motor vehicle to another. It can also be modified for use when plaintiff claims wanton entrustment, but the plaintiff must prove that the defendant “entrusted a vehicle (to entrustee) while knowing that entrustment would likely or probably result in injury to others.” *Jordan ex rel. Jordan v. Calloway*, 7 So. 3d 310, 317 (Ala. 2008).

When the plaintiff establishes ownership of the vehicle, an administrative presumption arises that it was entrusted to the driver. *Edwards v. Valentine*, 926 So. 2d 315, 320 (Ala. 2005). See APJI 26.11.

References

- Restatement (Second) of Torts § 390 (1965).
- Jordan ex rel. Jordan v. Calloway*, 7 So. 3d 310 (Ala. 2008).
- Edwards v. Valentine*, 926 So. 2d 315 (Ala. 2005).
- Halford v. Alamo Rent-A-Car, LLC*, 921 So. 2d 409 (Ala. 2005).
- Pryor v. Brown & Root USA, Inc.*, 674 So. 2d 45 (Ala. 1995).
- Liao v. Harry's Bar*, 574 So. 2d 775 (Ala. 1990).
- Mason v. New*, 475 So. 2d 854 (Ala. 1985).
- Bruck v. Jim Walter Corp.*, 470 So. 2d 1141 (Ala. 1985).
- Keller v. Kiedinger*, 389 So. 2d 129 (Ala. 1980).
- Big 3 Motors, Inc. v. Hawie*, 895 So. 2d 349 (Ala. Civ. App. 2004).
- West's Key Number Digest, Automobiles ⇨192(11).
- 1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* §§ 6.01 to 6.05 (5th ed. 2010).
- Jenelle M. Marsh, *Alabama Law of Damages* § 30:7 (6th ed. 2012).
- Am. Jur. 2d, *Automobiles and Highway Traffic* §§ 617 to 620.
- Am. Jur. 2d, *Negligence* § 318.

MOTOR VEHICLES

APJI 26.10

Note, Negligent Entrustment in Alabama, 23 Ala. L. Rev. 733 (Summer 1971).

APJI 26.11 PRESUMPTION—ENTRUSTMENT**(OMITTED)**

Notes on Use

When a person drives a car that belongs to another, there is an administrative presumption that the person drives the car with the owner's permission.

An administrative presumption is not a true presumption, and its function is only to shift the burden to the defendant to go forward with the evidence. Ala. R. Evid. 301; Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 451.01 (5) (b) (6th ed. 2009).

The Committee decided not to state a 'bright-line' rule about how administrative presumptions are applied and how trial judges should rule on JML. These rulings are guided by the proof produced by a plaintiff, and the proof produced by a defendant, if any, to rebut an administrative presumption. The Committee suggests the bench and bar consult the references stated below, later cases, treatises, and other writings about administrative presumptions.

References

Ala. R. Evid. 301.

Edwards v. Valentine, 926 So. 2d 315 (Ala. 2005).

Thompson v. Havard, 285 Ala. 718, 235 So. 2d 853 (1970).

West's Key Number Digest, Automobiles ☞242(6).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 44.03 (5th ed. 2010).

Note, Negligent Entrustment in Alabama, 23 Ala. L. Rev. 733, 738 (Summer 1971).

**APJI 26.12 DRIVER'S NEGLIGENCE IMPUTED
TO PASSENGER [PL]**

Plaintiff (name of plaintiff) says (name of driver) was negligent, and defendant (name of defendant) is responsible for the driver's negligence.

(Name of defendant) is responsible for the driver's negligence if:

1. (He/she) owned and was riding in (car/truck/etc.);
2. (He/she) controlled or had the right to control the way (name of driver) drove (car/truck/etc.); and,
3. The trip was for the benefit of (name of defendant) or the benefit of (name of defendant) and the driver.

Notes on Use

Use this instruction when the owner or the owner's bailee or permissive user is in the vehicle, and the driver's conduct may be imputed to the owner, etc.

This instruction applies when there is no technical principal-agent or master-servant relationship. *Downes v. Norrell*, 261 Ala. 430, 434, 74 So. 2d 593, 597 (1954). Use the instructions in Chapter 3, Agency and Vicarious Liability, when the claim or defense is based on a technical principal-agent or master-servant relationship.

When the owner is in the vehicle, an administrative presumption arises that the driver is the owner's agent or servant and the owner had control and the right to direct the operation of the vehicle. APJI 26.14.

References

Kinard v. Carter, 518 So. 2d 1248 (Ala. 1987).

Foster v. Floyd, 276 Ala. 428, 163 So. 2d 213 (1964).

Downes v. Norrell, 261 Ala. 430, 74 So. 2d 593 (1954).

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Johnson v. Battles, 255 Ala. 624, 52 So. 2d 702 (1951).

Woodson v. Hare, 244 Ala. 301, 13 So. 2d 172 (1943).

West's Key Number Digest, Automobiles ⌘198(1), 198(4);
Negligence ⌘272.

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort
Law § 37.03[3] (5th ed. 2010).

Am. Jur. 2d, Automobiles and Highway Traffic §§ 713, 703,
705 to 710.

Am. Jur. 2d, Negligence §§ 1121, 1122, 1136, 1137.

**APJI 26.13 DRIVER'S WANTONNESS IMPUTED
TO PASSENGER [PL]**

Plaintiff (name of plaintiff) says (name of driver) was wanton, and defendant (name of defendant) is responsible for the driver's wanton conduct.

(Name of defendant) is responsible for the driver's wanton conduct if:

1. (He/she) owned and was riding in the (car/truck/etc.);
2. (He/she) controlled or had the right to control the way (name of driver) drove the (car/truck/etc.); and,
3. The trip was for the benefit of (name of defendant) or the benefit of (name of defendant) and the driver.

Notes on Use

See APJI 26.12 Notes on Use.

References

Foster v. Floyd, 276 Ala. 428, 163 So. 2d 213 (1964).

West's Key Number Digest, Automobiles ⇐192(1).

**APJI 26.14 PRESUMPTION—OWNERSHIP OF
VEHICLE****(OMITTED)**

Notes on Use

When a person drives a vehicle that belongs to another, upon proof of ownership there is an administrative presumption that the driver is the owner's agent or servant and the driver is acting within the line and scope of authority or employment.

An administrative presumption is not a true presumption, and its function is only to shift the burden to the defendant to go forward with the evidence. Ala. R. Evid. 301; Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 451.01(5)(b) (6th ed. 2009).

The Committee decided not to state a 'bright-line' rule about how administrative presumptions are applied and how trial judges should rule on JML. These rulings are guided by the proof produced by a plaintiff, and the proof produced by a defendant, if any, to rebut an administrative presumption. The Committee suggests the bench and bar consult the references stated below, later cases, treatises, and other writings about administrative presumptions.

The user may wish to consult the references to the former instruction, 1 APJI 26.13 in the second edition.

References

Ala. R. Evid. 301.

Felder v. Hill, 447 So. 2d 178 (Ala. 1984).

Thompson v. Havard, 285 Ala. 718, 235 So. 2d 853 (1970).

Smith v. Johnson, 283 Ala. 151, 214 So. 2d 846 (1968).

Rogers v. Hughes, 252 Ala. 72, 39 So. 2d 578 (1949).

Tullis v. Blue, 216 Ala. 577, 114 So. 185 (1927).

Brown v. K & M Tree Services, Inc., 258 So. 3d 354 (Ala. Civ. App. 2018).

Coker v. Penfield Chair Co., Inc., 836 So. 2d 878 (Ala. Civ. App. 2002).

West's Key Number Digest, Automobiles ¶242(6).

2 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 37.03, 44.03 (5th ed. 2010).

Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 451.01(5)(b) (6th ed. 2009).

Am. Jur. 2d, Automobiles and Highway Traffic §§ 1118, 1119, 1124.

**APJI 26.15 PRESUMPTION—OWNER
PRESENT IN VEHICLE****(OMITTED)**

Notes on Use

When the owner is present in a vehicle driven by another, upon proof of ownership there is an administrative presumption that the driver was the owner's agent or that the owner had control and the right to direct the operation of the vehicle.

An administrative presumption is not a true presumption, and its function is only to shift the burden to the defendant to go forward with the evidence. Ala. R. Evid. 301; Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 451.01(5)(b) (6th ed. 2009).

The Committee decided not to state a 'bright-line' rule about how administrative presumptions are applied and how trial judges should rule on JML. These rulings are guided by the proof produced by a plaintiff, and the proof produced by a defendant, if any, to rebut an administrative presumption. The Committee suggests the bench and bar consult the references stated below, later cases, treatises, and other writings about administrative presumptions.

References

Ala. R. Evid. 301.

Stanley v. Hayes, 276 Ala. 532, 165 So. 2d 84 (1964).

West's Key Number Digest, Automobiles ⇨242(6).

2 Michael G. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 37.03, 44.03 (5th ed. 2010).

Charles W. Gamble & Robert J. Goodwin, McElroy's Alabama Evidence § 451.01(5)(b) (6th ed. 2009).

Am. Jur. 2d, Automobiles and Highway Traffic §§ 616, 1103, 1123.

**APJI 26.16 DRIVING EMPLOYER'S VEHICLE
[PL]**

When an employer provides a vehicle to an employee to be used by the employee going to and from work, and the transportation arrangement benefits both of them, the employer-employee relationship continues when the vehicle is used for that purpose.

Notes on Use

Use this instruction when an employee is traveling to and from work and is driving a vehicle that either belongs to the employer or the employer pays part of the expenses for the vehicle, and there is evidence that the arrangement is beneficial to the employer.

References

International Brd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Hatas, 287 Ala. 344, 252 So. 2d 7 (1971).

Atlanta Life Ins. Co. v. Stanley, 276 Ala. 642, 165 So. 2d 731 (1964).

Franklin v. Truck & Auto Rentals, Inc., 276 Ala. 237, 160 So. 2d 645 (1963).

General Foods Corp. v. Coney, 35 Ala. App. 492, 48 So. 2d 781 (1950).

Blair v. Greene, 247 Ala. 104, 22 So. 2d 834 (1945).

West's Key Number Digest, Automobiles ¶193 (8.1).

2 Michael G. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 37.03, 44.03 (5th ed. 2010).

Am. Jur. 2d, Automobiles and Highway Traffic §§ 746 to 754.

Jerome F. Hoffman, Thinking About Presumptions: The "Presumption" of Agency From Ownership as Study Specimen, 48 Ala. L. Rev. 885 (Spring 1997).

Joseph H. King, The Common Knowledge Exception to the

APJI 26.16**ALABAMA PATTERN JURY INSTRUCTIONS**

Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice, 59 Ala. L. Rev. 51 (2007).

APJI 26.17 to 26.20

Reserved

**APJI 26.21 VIOLATION OF RULE OF THE
ROAD OR MUNICIPAL TRAFFIC
ORDINANCE—NEGLIGENCE PER
SE [PL]**

A rule of the road is a law passed by the legislature that governs how people drive their motor vehicles. Plaintiff (name of plaintiff) says that defendant (name of defendant) drove (his/her/its) vehicle in a way that violated the rule stated in Alabama Code § ____ and (his/her/its) conduct is negligence.

Section ____ states: (Read the code section or sections)

If (name of defendant) violated § ____, (he/she/it) was negligent. However, before (name of plaintiff) can recover for (name of defendant)'s negligent driving (name of plaintiff) must also prove that the negligence caused (him/her) harm.

You must decide if (name of defendant) violated this rule of the road. If you find (he/she/it) violated the rule, you must then decide if the violation caused (name of plaintiff) harm.

Notes on Use

Use this instruction when the defendant violates a rule of the road or a municipal traffic ordinance and the violation is negligence per se. If plaintiff claims defendant violated a municipal traffic ordinance, the wording must be modified to accommodate this situation.

The Alabama Rules of the Road Act, 1980 Ala. Acts 434 (codified at 32-5A-1 to 32-5A-195 (1975) (West's Alabama Code), applies to the operation of vehicles upon highways except when a different place is specifically referred to in a specific section. Section 32-5A-2 (1). Additionally, other code sections, e.g., §§ 32-5A-190 to 32-5A-195, apply upon highways and elsewhere throughout the state. Section 32-5A-2 (2).

The premise of the negligence per se doctrine is stated in *Parker Bldg. Services Co., Inc. v. Lightsey ex rel. Lightsey*, 925 So. 2d 927, 930–31 (Ala. 2005), as follows:

The doctrine of negligence per se or negligence as a matter of law arises from the premise that the legislature may enact a statute that replaces the common-law standard of the reasonably prudent person with an absolute, required standard of care. *Thomas Learning Center, Inc. v. McGuirk*, 766 So. 2d 161, 171 (Ala. Civ. App. 1998). When the legislature adopts such a statute, anyone who violates it and causes an injury to a person whom the statute was intended to protect is liable for negligence per se. *Id.* Proof of a violation of the statute is proof of negligence. *Id.*

There is no distinction between the violation of a rule of the road or a municipal traffic ordinance. *Simpson v. Glenn*, 264 Ala. 519, 88 So. 2d 326 (1956). The doctrine is also referred to as negligence as a matter of law and statutory negligence.

If the rule of the road “requires a judgment to be made on the part of the driver, the reasonable man standard applies and a violation of the statute is not negligence per se.” *Consolidated Freightways, Inc. v. Pacheco-Rivera*, 524 So. 2d 346, 350 (Ala. 1988). When confronted with a case that the trial judge must decide if the violation is negligence per se, he or she must consider four elements. The elements are: the statute or municipal ordinance must have been enacted to protect a class of persons, of which the plaintiff is a member; the harm must be of a type contemplated by the statute or ordinance; the defendant must have violated the statute or ordinance; and the violation must have been the cause of the harm. *Lightsey* at 931; *Fox v. Bartholf*, 374 So. 2d 294 (Ala. 1979).

The application of the negligence per se doctrine is not limited to claimed violations of the rules of the road; it can also apply to claimed violations of the safe-vehicle statutes (§§ 32-5-210 to 32-5-250). *Brown v. Gold Kist, Inc.*, 540 So. 2d 663 (Ala. 1988). In *Brown*, the plaintiff claimed the vehicle’s windshield wipers were not in good working order, § 32-5-215 (b) and (c), and the vehicle did not have adequate brakes, § 32-5-212.

References

Ala. Code §§ 32-5A-1 to 32-5A-195 (1975) (West’s Alabama Code).

Ala Code §§ 32-5A-190 to 32-5A-195 (1975) (West’s Alabama Code).

Norris v. City of Montgomery, 821 So. 2d 149 (Ala. 2001).

Parker Bldg. Services Co., Inc. v. Lightsey ex rel. Lightsey, 925 So. 2d 927 (Ala. 2005).

Brown v. Gold Kist, Inc., 540 So. 2d 663 (Ala. 1988).

Consolidated Freightways, Inc. v. Pacheco-Rivera, 524 So. 2d 346, 350 (Ala. 1988).

Fox v. Bartholf, 374 So. 2d 294 (Ala. 1979).

Simpson v. Glenn, 264 Ala. 519, 88 So. 2d 326 (1956).

Edwards v. U.S., 552 F. Supp. 635 (M.D. Ala. 1982).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 1.02[3] (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 30:3 (6th ed. 2012).

West's Key Number Digest, Automobiles ☞238(4), 242(3), 244, 245, 246(14), 214(40); Negligence ☞222, 238, 259, 409, 1523, 1560, 1666, 1704.

Am. Jur. 2d, Automobiles and Highway Traffic § 1154.

Am. Jur. 2d, Negligence §§ 685 to 690, 738, 752, 754.

Note, The Doctrine of Statutory Negligence in Alabama, 27 Ala. L. Rev. 155 (1975).

**APJI 26.22 VIOLATION OF RULE OF THE
ROAD OR MUNICIPAL TRAFFIC
ORDINANCE—PRIMA FACIE
EVIDENCE OF NEGLIGENCE [PL]**

(A rule of the road is a law passed by the legislature that governs how people drive their motor vehicles.)

Plaintiff (name of plaintiff) says that defendant (name of defendant) drove (his/her/its) vehicle in a way that violated the rule stated in Alabama Code § ____ and (his/her/its) conduct was negligence.

Section ____ states: (Read the code section or sections).

If (name of defendant) violated § ____, this is evidence you will consider when deciding if (he/she/it) was negligent.

Notes on Use

Use this instruction when the plaintiff presents substantial evidence that the defendant violated a rule of the road that is prima facie evidence of negligence. If plaintiff claims the defendant violated a municipal traffic ordinance, the wording must be modified to accommodate this situation.

A rule of the road is only prima facie evidence of negligence when the rule of the road requires a judgment to be made on the part of the driver. *Consolidated Freightways, Inc. v. Pacheco-Rivera*, 524 So. 2d 346, 349 (Ala. 1988).

Ala. Code § 32-5A-177 (b) (1975) (West's Alabama Code) states, as follows:

The provision of this article declaring maximum speed limitations shall not be construed to relieve the plaintiff in any action from the burden of proving negligence on the part of the defendant as the proximate cause of an accident.

See APJI 26.21, Notes on Use.

References

Cf., *Phillips v. Seward*, 51 So. 3d 1019 (Ala. 2010) (a person

who drives into rear of a vehicle stopped in obedience to a traffic signal is prima facie negligent but defendant may present evidence to rebut the prima facie case).

Cf. *Harshaw v. Nationwide Mut. Ins. Co.*, 834 So. 2d 762 (Ala. 2002) (same as above).

Horton v. Mobile Cab & Baggage Co., 281 Ala. 35, 198 So. 2d 619 (1967) (restrictions on speed).

Dean v. Mayes, 274 Ala. 88, 145 So. 2d 439 (1962) (unattended vehicle).

Edger v. Karl Bradley Ford, Inc., 41 Ala. App. 638, 147 So. 2d 858 (1962) (unlawful to exceed certain speeds).

Klein v. Harris, 268 Ala. 540, 108 So. 2d 425 (1958).

Frith v. Studdard, 267 Ala. 315, 101 So. 2d 305 (1958).

Luquire Ins. Co. v. McCalla, 244 Ala. 479, 13 So. 2d 865 (1943) (driving on the right side of highway and vehicles meeting).

West's Key Number Digest, Automobiles ⇨246(14).

Alabama Rules of the Road Act (codified at Ala. Code §§ 32-5A-1 to 32-5A-330 (1975) (West's Alabama Code).

Am. Jur. 2d, Negligence §§ 234 to 273.

**APJI 26.23 CONTRIBUTORY NEGLIGENCE—
VIOLATION OF RULE OF THE
ROAD OR MUNICIPAL TRAFFIC
ORDINANCE [PL]**

(If the definition of rule of the road has not been instructed, read the first sentence from APJI 26.21.)

Defendant (name of defendant) says that even if (he/she/it) was negligent, plaintiff (name of plaintiff) violated a rule of the road and this conduct was a cause of (his/her/its) harm. (Name of defendant) says (name of plaintiff) violated Ala. Code § ____.

Section ____ states: (Read the code section or sections).

If (name of defendant) proves that (name of plaintiff) violated § ____, (he/she/it) was contributory negligent. However, before the violation would keep (name of plaintiff) from recovering, (name of defendant) must also prove that the contributory negligence was a cause of (name of plaintiff's) harm.

You must decide if (name of plaintiff) violated this rule of the road. If you find (he/she/it) violated the rule, you must then decide if the violation was a cause of (name of plaintiff's) harm.

If (name of defendant) proves that (name of plaintiff's) conduct violated the rule and the violation was a cause of (his/her/its) harm, (name of plaintiff) cannot recover on (his/her/its) claim that (name of defendant) was negligent.

Notes on Use

Use this instruction when defendant pleads the affirmative defense of contributory negligence per se. See APJI 26.12 Notes on Use.

References

See APJI 26.12 references.

Russell v. Mathis, 686 So. 2d 241 (Ala. 1996).

**APJI 26.24 CONTRIBUTORY NEGLIGENCE—
PASSENGER OR GUEST FAILURE
TO KEEP LOOKOUT [PL]**

A person riding in a vehicle must use reasonable care for (his/her) own safety. However, a passenger is not required at all times to keep a constant lookout for sudden or unexpected danger. Unless the situation suggests to the passenger that it is necessary to keep a lookout, (he/she) does not have to do so.

Notes on Use

Use this instruction when the defendant pleads the affirmative defense that the passenger was contributory negligent because he or she did not keep a lookout. The instruction only addresses a rider's duty to use reasonable care. It is not used when a third party attempts to impute the driver's negligent or wanton conduct to the passenger. On this point, see APJI 26.12 and 26.13.

The duty to keep a lookout can arise in any number of situations, e.g., *Thomas v. Earnest*, 72 So. 3d 580 (Ala. 2011) (intersection collision, passenger in rear seat); *Hamilton v. Kinsey*, 337 So. 2d 344 (Ala. 1976) (driver and passenger intoxicated).

The instruction is appropriate for a passenger's claim against a third party or it can be used, when appropriate, in a case involving the guest statute. The Committee suggests that the user read the referenced cases to determine if the instruction should be used in a given case.

See, APJI 28.01, Negligence Defined.

See, APJI 30.00, Contributory Negligence.

See, APJI, 28.06 to 28.08, Presumptions relating to minors.

See, APJI 28.09, Voluntary Intoxication.

References

Thomas v. Earnest, 72 So. 3d 580 (Ala. 2011) and the cases cited at 584–85.

MOTOR VEHICLES

APJI 26.24

Driver v. National Sec. Fire & Cas. Co., 658 So. 2d 390 (Ala. 1995).

Employers Cas. Co. v. Hagendorfer, 393 So. 2d 999 (Ala. 1981).

Williams v. Pope, 281 Ala. 382, 203 So. 2d 105 (1967).

Birmingham Ry., Light & Power Co. v. Barranco, 203 Ala. 639, 84 So. 839 (1920).

White v. Pratt, 721 So. 2d 210 (Ala. Civ. App. 1998).

West's Key Number Digest, Automobiles ⇨224.

**APJI 26.25 CONTRIBUTORY NEGLIGENCE—
PASSENGER—NEGLIGENT,
RECKLESS OR INCOMPETENT
DRIVER [PL]**

When a passenger knows that a driver's conduct is (negligent) (reckless) (incompetent), the passenger must use reasonable care for (his/her) own safety.

A driver's conduct is negligent if (he/she) fails to use reasonable care to prevent harm to others.

A driver's conduct is reckless if (he/she) is indifferent to the rights and safety of other persons or property.

A driver is incompetent if (he/she) is likely to drive the vehicle in a way that involves an unreasonable risk of harm to (himself/herself) or others.

Notes on Use

Use this instruction when the defendant pleads the affirmative defense that the passenger was contributorily negligent; and it can be used when the defendant is a third party, or in a guest statute case when the plaintiff is a paying passenger. It is not used when a third party attempts to impute the driver's negligent conduct to the passenger.

This instruction must be given in conjunction with APJI 30.00, Contributory Negligence.

References

Brown v. AAA Wood Products, Inc., 380 So. 2d 784 (Ala. 1980).

Hamilton v. Kinsey, 337 So. 2d 344 (Ala. 1976).

Williams v. Pope, 281 Ala. 382, 203 So. 2d 105 (1967).

Proctor v. Coffey, 227 Ala. 318, 149 So. 838 (1933).

West's Key Number Digest, Negligence ⌘274.

**APJI 26.26 DRIVER'S NEGLIGENCE IMPUTED
TO PASSENGER AFFIRMATIVE
DEFENSE [PL]**

Defendant (name of defendant) says (name of driver)'s conduct was negligent and that (his/her) negligence was a cause of plaintiff (name of plaintiff)'s harm

To prove this defense, (name of defendant) must prove all of the following:

1. That (name of driver) was negligent;
2. That (name of plaintiff) controlled or had a right to control the way (name of driver) drove the (car/truck/etc.); and,
3. That (name of driver)'s negligence was a cause of (name of plaintiff)'s harm.

If (name of defendant) proves these things you will find for (name of defendant).

Notes on Use

Use this instruction when the plaintiff—passenger sues a third party for negligence, neither the owner nor the owner's bailee is in the vehicle, and the defendant—third party imputes the driver's conduct to the plaintiff—passenger.

References

- Thomas v. Earnest, 72 So. 3d 580, 587 (Ala. 2011).
- Adams v. Coffee County, 596 So. 2d 892, 895 (Ala. 1992).
- Begley v. Morgan, 442 So. 2d 8 (Ala. 1983).
- Shannon v. Hollingsworth, 291 Ala. 159, 279 So. 2d 428 (1973).
- Barnett v. Norfolk Southern Ry. Co., 671 So. 2d 718 (Ala. Civ. App. 1995).

APJI 26.26**ALABAMA PATTERN JURY INSTRUCTIONS**

West's Key Number Digest, Automobiles ⚙227.5; Negligence ⚙575.

Am. Jur. 2d, Automobiles § 705 to 711.

Am. Jur. 2d, Negligence §§ 1121, 1122, 1136, 1137, 1143, 1147, 1149.

Jenelle M. Marsh, Alabama Law of Damages § 30:7 (6th ed. 2012).

Restatement (Second) of Torts § 485 (1966).

**APJI 26.27 FAILURE TO WEAR SEAT BELT
NOT CONTRIBUTORY
NEGLIGENCE [PL]**

It is not contributory negligence if the rider in a passenger car does not wear a seatbelt.

Notes on Use

This statement of law is included only as an easy reference for the bench and bar; it is not an instruction. It is based on the Alabama Safety Belt Use Act of 1991, 1991 Ala. Acts 255 § 7. The Act is codified at Ala. Code §§ 32-5B-1 to 32-5B-8 (1975) (West's Alabama Code).

Section 32-5B-7 states: "Failure to wear a safety belt in violation of this chapter shall not be considered evidence of contributory negligence and shall not limit the liability of an insurer, nor shall the conviction be entered on the driving record of any individual charged under the provisions of this chapter."

Passenger car is defined in Ala. Code § 32-5B-2 (1975) (West's Alabama Code).

Child passenger restraints are addressed in Ala. Code § 32-5-222 (1975) (West's Alabama Code). Section 32-5-222(a) states: "In no event shall failure to wear a child passenger restraint system be considered as contributory negligence."

References

Ala. Code § 32-5B-7 (1975) (West's Alabama Code).

1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 2.05 (5th ed. 2010).

1 Ally W. Howell, *Alabama Personal Injury and Torts* §§ 3:43, 5:12 (2012 ed.).

Jenelle M. Marsh, *Alabama Law of Damages* § 30:14 (6th ed. 2012).

Am. Jur. 2d, *Automobiles and Highway Traffic* §§ 541, 568.

Walter L. Levine, III, *Buckling Down to Buckle Up: A*

Jurisdictional Survey of the Admissibility of Seat Belt Evidence and the Need for A Model Seat Belt Act, 41 Cumb. L. Rev. 333 (2011).

David A. Mobley, Revisiting Alabama's Seat Belt Defense: Is the Failure to Buckle Up A Defense to AEMLD Claims, 53 Ala. L. Rev. 963 (Spring 2002).

Ala. Code § 32-5-222(a) (1975) (West's Alabama Code).

APJI 26.28 SKIDDING [PL]

The fact that the vehicle skidded on a slick or icy road is not negligence. However, the driver is negligent if (he/she) did not use reasonable care and that caused (his/her/its) vehicle to skid into another vehicle and cause harm.

Notes on Use

Use this instruction as appropriate.

References

Trapp v. Vess, 847 So. 2d 304 (Ala. 2002).

Franklin v. Cannon, 565 So. 2d 119 (Ala. 1990).

Harris v. Brewer, 487 So. 2d 252 (Ala. 1986).

National Biscuit Co. v. Wilson, 256 Ala. 241, 54 So. 2d 492 (1951).

West's Alabama Digest, Automobiles ☞168(3), 244(20).

Am. Jur. 2d, Automobiles and Highway Traffic § 731.

APJI 26.29 to 26.33

Reserved

**APJI 26.34 GUEST STATUTE—AFFIRMATIVE
DEFENSE—ALA. CODE § 32-1-2
(1975) (WEST'S ALABAMA CODE)
[PL]**

Under the Alabama guest statute, if (name of plaintiff) is a guest passenger and even if (name of defendant) was negligent, (he/she) is not responsible for (name of plaintiff's) harm. This is an affirmative defense to (name of plaintiff's) claim that (name of defendant) was negligent, and it must be proved by (name of defendant).

To prove this defense, (name of defendant) must prove to your reasonable satisfaction that (name of plaintiff) was a guest passenger.

A person riding in another's vehicle is either a guest passenger or a paying passenger. The person's status as either a guest or paying passenger is usually determined at the start of the trip.

A guest passenger is generally defined as a person whom the driver gives transportation only for the guest passenger's benefit. A paying passenger is generally defined as a person whom the driver transports in exchange for some benefit or when the transportation benefits both the driver and the passenger.

(If the transportation tends to further the mutual interest of the driver and rider for their common benefit, the passenger is a paying passenger.)

(If the main reason for the trip is for the driver's purposes, and the driver asks the rider to go with him to provide some benefit or service to the driver, the rider is a paying passenger.)

A benefit can be money, services, or some other form of an actual present or future benefit. However, an actual benefit is not personal gratification the driver may feel because (he/she) did a hospitable act, or performed some kindness;

and it is not the good will that may have resulted because (he/she) provided transportation. A future benefit must not be speculative or depend on future circumstances.

If you decide that (name of plaintiff) was a guest, (he/she) cannot recover on (his/her) claim that (name of defendant) was negligent.

Notes on Use

Use this instruction when the defendant pleads the guest statute as an affirmative defense. *Penton v. Favors*, 262 Ala. 262, 78 So. 2d 278 (1955). See, *Neal v. Sem Ray, Inc.*, 68 So. 3d 194 (Ala. Civ. App. 2011). See, *Walker v. Garris*, 368 So. 2d 277 (Ala. 1979).

This instruction is intended to be a comprehensive instruction on the elements of a defense under the guest statute. However, it does not include all of the applicable law because it would become unwieldy. The instruction assumes that the plaintiff had the ability to and did consent to the transportation. See, APJI 26.37.

Roe By and Through Roe v. Lewis, 416 So. 2d 750 (Ala. 1982) states several factors the jury can consider to decide if the plaintiff is a paying passenger or a guest. Among them are:

1. The reason or purpose for the trip.
2. Any present or former relationship between the parties. Are they friends? Are they related?
3. Any implied or stated arrangement between them about paying the expenses of the trip. But, the fact that the rider paid some money to the driver, standing alone, does not mean that the rider was a paying passenger. If the passenger had to pay as a condition for the ride, the rider may be a paying passenger and not a passenger guest. See *Sellers v. Sexton*, 576 So. 2d 172, 174 (Ala. 1991) for a thorough discussion of this factor.
4. Whether the driver had given the rider rides before the wreck.
5. The reason or purpose for the trip (business, social, other).

6. Any other factor the evidence brings into focus the status of the driver and rider at the time of the wreck.

The definitions of negligence, wantonness, and willful conduct are stated in chapters 28 and 29. Negligence, APJI 28.00. Wantonness, APJI 29.00. Willful conduct, APJI 29.01).

Other instructions that may be required are:

Contributory negligence of passenger, APJI 26.25.

Duty owed by passenger, APJI 26.24.

Protests by passenger, APJI 26.36.

Driver's misrepresentations, APJI 26.35.

Guest Statute – Consent – Minor Under Fourteen Years Old, APJI 26.37.

References

Ala. Code § 32-1-2 (1975) (West's Alabama Code).

Hurst v. Sneed, 229 So. 3d 215 (Ala. 2017). The Court relied upon the three part test in Sullivan v. Davis, 263 Ala. 685, 83 So. 2d 434, 436–37 (1955) to determine whether the rider in the vehicle was a guest or a passenger for hire.

Coffey v. Moore, 948 So. 2d 544 (Ala. 2006).

Tolbert v. Tolbert, 903 So. 2d 103 (Ala. 2004).

Carter v. Reed, 638 So. 2d 833 (Ala. 1994).

Dorman v. Jackson, 623 So. 2d 1056 (Ala. 1993).

Davis v. Davis, 622 So. 2d 901 (Ala. 1993).

Sellers v. Sexton, 576 So. 2d 172 (Ala. 1991).

Klaber v. Elliott, 533 So. 2d 576 (Ala. 1988).

Roe v. Lewis, 416 So. 2d 750 (Ala. 1982).

Walker v. Garriss, 368 So. 2d 277 (Ala. 1979).

Tonini v. Campagna, 991 So. 2d 266 (Ala. Civ. App. 2008).

Thedford v. Payne, 813 So. 2d 905 (Ala. Civ. App. 2001).

West's Key Number Digest, Automobiles ☞181(1), 181(2), 181(5).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law §§ 5.01 to 5.02(1) (5th ed. 2010).

Jenelle M. Marsh, Alabama Law of Damages § 30:5 (6th ed. 2012).

Am. Jur. 2d, Automobiles and Highway Traffic §§ 550, 551.

Susan Randall, Only in Alabama: A Modest Tort Agenda, 60 Ala. L. Rev. 977, 988–994 (2009).

**APJI 26.35 GUEST STATUTE—
MISREPRESENTATION [PL]**

Plaintiff (name of plaintiff) says (he/she) was not a guest in (name of defendant's) vehicle. (Name of plaintiff) says (he/she) got into the vehicle only because (name of defendant) told (him/her) or implied (state the misrepresentation).

If you decide that (name of plaintiff) got into the vehicle only because (state the misrepresentation), then (he/she) was a passenger and not a guest.

Notes on Use

The host-guest relationship under the guest statute involves the consent of the guest. The plaintiff does not consent when the defendant's misrepresentation induces the plaintiff to get into a vehicle.

References

Crovo v. Aetna Cas. & Sur. Co., 336 So. 2d 1083 (Ala. 1976).

West's Key Number Digest, Automobiles ¶181(2), 245(24).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 5.02[2] (5th ed. 2010).

**APJI 26.36 GUEST STATUTE—PROTEST OF
GUEST [PL]**

Plaintiff (name of plaintiff) says (he/she) was a passenger and not a guest in (name of defendant's) vehicle when it wrecked. (Name of plaintiff) says (he/she) complained to (name of defendant) (state what plaintiff claims about defendant's driving), and (he/she) asked (name of defendant) to (slow down, let him/her out, both, etc), but (name of defendant) would not do it.

If you decide that (name of defendant) was driving the way (name of plaintiff) says (name of defendant) was driving. If you also decide that (name of plaintiff) complained to (name of defendant) and asked (him/her) (state what plaintiff claims), but (name of defendant) would not do it. And if you also decide (name of defendant)'s conduct was so bad that (name of plaintiff) was essentially a captive in the car, then (name of plaintiff) would be a passenger, not a guest, when the vehicle wrecked.

Notes on Use

Because the guest-host relationship involves the plaintiff's consent, in certain circumstances the plaintiff's protest about the defendant's driving can change the plaintiff's status from guest to passenger.

References

McDougle v. Shaddrix, 534 So. 2d 228 (Ala. 1988).

Roe v. Lewis, 416 So. 2d 750 (Ala. 1982).

West's Key Number Digest, Automobiles ⇨181(2), 245(24).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 5.02[2] (5th ed. 2010).

Am. Jur. 2d, Automobiles and Highway Traffic § 565.

**APJI 26.37 GUEST STATUTE—CONSENT
CHILD UNDER FOURTEEN YEARS
OLD [PL]**

Defendant (name of defendant) says (he/she/it) is not responsible for (name of child)'s harm because (name of child) was a guest-passenger.

The relationship between a driver and guest-passenger is based on consent, and it involves some acceptance by the guest passenger of the hazards and risks of riding in a vehicle driven by another person. To prove this defense, (name of defendant) must prove to your reasonable satisfaction that (name of child) was able to appreciate and accept the possible hazards and risks of riding with (name of defendant).

In determining whether (name of child) had the ability to consent to the guest-passenger relationship, you may consider:

1. The age of the child;
2. The intelligence of the child;
3. The child's actual knowledge of any risk;
4. The child's ability to exercise discretion;
5. The educational level of the child;
6. The maturity of the child; and
7. Any other evidence that helps you decide this question.

If you decide that (name of child) did not have the ability to consent to be a guest-passenger, you will not consider this defense. If you determine that (name of child) had the ability to consent to be a guest-passenger, you will then decide whether (name of child) was a guest-passenger.

Notes on Use

Use this instruction when the plaintiff interjects the issue that the child under fourteen years old did not have the capacity to consent to guest-passenger status. When the plaintiff presents sufficient evidence on this issue, the defendant must go forward with evidence that the minor did have capacity to consent to be a guest passenger.

References

Tolbert v. Tolbert, 903 So. 2d 103 (Ala. 2004).

Fox v. Hollar Co., Inc., 576 So. 2d 223 (Ala. 1991).

Knowles v. Poppell, 545 So. 2d 40 (Ala. 1989).

Walker v. Garriss, 368 So. 2d 277 (Ala. 1979).

Crovo v. Aetna Cas. & Sur. Co., 336 So. 2d 1083 (Ala. 1976).

West's Key Number Digest, Automobiles ⇨245(24).

1 Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law § 5.02[2] (5th ed. 2010).

**APJI 26.38 DRIVER'S SUDDEN LOSS OF
CONSCIOUSNESS—AFFIRMATIVE
DEFENSE [PL]**

(Name of defendant) says (he/she) suddenly lost consciousness immediately before the collision with (name of plaintiff's) vehicle. This is an affirmative defense to (name of plaintiff)'s claims and it must be proved by (name of defendant).

To prove this defense (name of defendant) must prove:

1. That (he/she) suddenly lost consciousness before the collision;
2. That (he/she) had no warning signs or knowledge that such a condition would happen; and,
3. That the collision happened because (name of defendant) lost consciousness.

If (name of defendant) proves this defense, you must find for (him/her).

Notes on Use

Use this instruction when the defendant pleads the affirmative defense of sudden loss of consciousness.

References

- Walker v. Cardwell, 348 So. 2d 1049 (Ala. 1977).
Moore v. Cooke, 264 Ala. 97, 84 So. 2d 748 (1956).
Malone v. Noblitt, 65 So. 3d 404 (Ala. Civ. App. 2010).
West's Key Number Digest, Automobiles ¶244.31.
Am. Jur. 2d, Automobiles and Highway Traffic § 736.

**APJI 26.39 MECHANICAL DEFECT—
AFFIRMATIVE DEFENSE [PL]**

Defendant (name of defendant) says (he/she/it) is not responsible for plaintiff (name of plaintiff)'s harm because a vehicle defect caused a mechanical failure that led to (name of plaintiff)'s harm.

A motor vehicle must be in reasonably safe condition before it is driven on the highway. This is the owner's or driver's responsibility. However, (name of defendant) is not responsible for (name of plaintiff)'s harm if (name of defendant) proves that the sole cause of the harm is a mechanical failure caused by a vehicle defect, and (he/she/it) did not know about the defect or by using reasonable care would not have known about the defect.

If (name of defendant) proves that the sole cause of the harm is a mechanical defect, and (name of defendant) did not know about the defect or by using reasonable care would not have known about the defect, (name of plaintiff) cannot recover on (his/her/its) claim.

Notes on Use

Use this instruction when the defendant pleads mechanical failure as a defense, and the defendant presents substantial evidence that a mechanical failure, not just an accident, in fact occurred.

Ala. Code §§ 32-5-210 to 32-5-250 (1975) (West's Alabama Code) specify certain safety requirements for vehicles. Not all of the code sections specify safety requirements; therefore, the user should examine each section. Additionally, the various code sections apply to vehicles operated on highways or roadways or streets or a public highway or a combination of these words. The words are defined in Ala. Code § 32-1-1.1 (1975) (West's Alabama Code).

References

Clayton v. LLB Timber Co., Inc., 70 So. 3d 283 (Ala. 2011).

Hamilton Auto Parts, Inc. v. Rea, 580 So. 2d 1328 (Ala. 1991).

APJI 26.39**ALABAMA PATTERN JURY INSTRUCTIONS**

Brown v. Gold Kist, Inc., 540 So. 2d 663 (Ala. 1988).

Childers v. Ashburn and Gray, Inc., 398 So. 2d 682 (Ala. 1981).

Motor Terminal & Transportation Co. v. Millican, 244 Ala. 39, 12 So. 2d 96 (1943).

Wood Lumber Co. v. Bruce, 275 Ala. 577, 157 So. 2d 3 (1963).

City of Montgomery v. Bennett, 487 So. 2d 942 (Ala. Civ. App. 1986).

Ryan v. Leach, 139 Ind. App. 14, 215 N.E.2d 877 (1966).

West's Key Number Digest, Automobiles ⇐148.

Am. Jur. 2d, Automobiles and Highway Traffic § 742.

A.L.R. Library

Products liability: lubricating products and systems, 80 A.L.R. 4th 972.

Products liability: tire rims and wheels, 16 A.L.R.4th 137.

Products liability: defective vehicular windows, 3 A.L.R.4th 489.

Products liability: defective vehicular gasoline tanks, 96 A.L.R.3d 265.

**APJI 26.40 POLICE OFFICER—NEGLIGENT
PURSUIT [PL]**

Defendant (name of defendant) was a (police officer) (highway patrolman) (other) employed by (name of government agency). (He/she) was in pursuit of (name of suspected violator) when (name of plaintiff) was harmed.

If a suspected violator flees, the (police officer) (highway patrolman) (other) has the legal duty to catch the violator, and (name of defendant) can drive at a speed and take action that is reasonably necessary to catch (name of violator) so long as (name of defendant)'s conduct is not negligent. When carrying out this duty, (name of defendant) does not have to drive (his/her) vehicle the way that a private citizen must drive on the highways. (Name of defendant) is not responsible for harm caused by the chase unless (his/her) conduct was negligent.

The standard of care (name of defendant) must have used in the high speed chase is the care, skill, and diligence that a reasonably prudent (police officer, etc.) would have used in the same or similar situation. In deciding whether or not (name of defendant)'s conduct was negligent, you must decide what a reasonably prudent (police officer, etc.) would not have done or would have done in the same or similar situation.

To make this decision, you should consider all the evidence including any generally accepted standards adopted and used by (police officers. etc.) in the same or similar situation.

If you are reasonably satisfied by the evidence that (name of defendant) was chasing a fleeing law violator and (name of defendant)'s conduct was the same as that of a reasonably prudent police officer under the same or similar situation, you must return a verdict for (name of defendant).

If you are reasonably satisfied by the evidence that (name of defendant) was chasing a fleeing law violator but

(name of defendant)'s conduct was not the same as that of a reasonably prudent police officer under the same or similar situation, and (his/her) conduct caused (name of plaintiff)'s harm, you must return a verdict for (name of plaintiff).

Unless (name of defendant)'s conduct was negligent, (he/she) is not responsible for any harm even though the pursuit may contribute to the violator's reckless driving.

Notes on Use

This instruction is case specific and may be used when plaintiff claims that the way a police officer drove a vehicle during a high speed chase caused plaintiff's harm. It should be modified to state the fact theories that underpin claims for negligent conduct.

The instruction does not address Ala. Code § 6-5-338 (1975) (West's Alabama Code) and *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000); *Ex parte Butts*, 775 So. 2d 173 (Ala. 2000); *Hollis v. City of Brighton*, 950 So. 2d 300 (Ala. 2006) immunity issues. *Blackwood v. City of Hanceville*, 936 So. 2d 495 (Ala. 2006) considered those issues before *Cranman*'s category four was extended by *Hollis*.

References

Gooden v. City of Talladega, 966 So. 2d 232 (Ala. 2007).

Cf., *Blackwood v. City of Hanceville*, 936 So. 2d 495 (Ala. 2006) (municipal police officer on emergency run—State-agent and Ala. Code § 6-5-338 (1975) (West's Alabama Code) immunity limited by Ala. Code § 32-5A-7 (1975) (West's Alabama Code)).

Accord, *Kendrick v. City of Midfield*, 203 So. 3d 1200 (Ala. 2016).

Seals v. City of Columbia, 641 So. 2d 1247 (Ala. 1994) (*per curiam*) (*Seals II*).

Smith v. Cook, 578 So. 2d 1055 (Ala. 1991).

Seals v. City of Columbia, 575 So. 2d 1061 (Ala. 1991) (*Seals I*).

Blair v. City of Rainbow City, 542 So. 2d 275 (Ala. 1989).

Doran v. City of Madison, 519 So. 2d 1308 (Ala. 1988) (Doran II).

Smith v. Bradford, 512 So. 2d 50 (Ala. 1987).

Doran v. City of Decatur, 510 So. 2d 813 (Ala. 1987) (Doran I).

Madison v. Weldon, 446 So. 2d 21 (Ala. 1984).

Belew v. U.S., 263 Fed. Appx. 1 (11th Cir. 2007).

West's Key Number Digest, Automobiles ☞175(1), 175(4), 187(2), 201(1.1), 238(8).

Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 378 to 381, 385, 386, 421 to 425.

1 Ally W. Howell, Alabama Personal Injury and Torts §§ 5:1, 3:26 (2012 ed.).

Jenelle M. Marsh, Alabama Law of Damages §§ 23:10, 23:17 (6th ed. 2012).

Ala. Code § 32-5A-7 (1975) (West's Alabama Code) (authorized emergency vehicles-privileges and conditions on privileges).

Ala. Code § 32-5A-115 (1975) (West's Alabama Code) (duty to yield right-of-way to emergency vehicle, duty of emergency vehicle driver, required emergency equipment).

Ala. Code § 32-5A-177(c) (1975) (West's Alabama Code) (state trooper may stop speeding driver based on certain information relayed to him).

Patrick T. O'Connor and William L. Norse, Jr., Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law, 57 Mer. L. Rev. 511 (Winter 2006).

**APJI 26.41 POLICE OFFICER—NEGLIGENT
FAILURE TO END PURSUIT [PL]**

Defendant (name of defendant) was a (police officer) (highway patrolman) (other) employed by (name of government agency). (He/she) was in pursuit of (name of suspected violator) when (name of plaintiff) was harmed.

(Name of plaintiff) says (name of defendant) negligently failed to end (his/her) pursuit of (name of violator) and the failure to end the pursuit caused (name of plaintiff) harm. (Name of plaintiff) says (name of defendant) should have ended the pursuit because (state plaintiff's reasons).

When a (police officer, etc.) pursues a person, (he/she) must use the care, skill, and diligence that a reasonably prudent (police officer, etc.) would have used in the same or similar situation. To decide if (name of defendant)'s conduct was negligent, you must decide whether (name of defendant) did something that a reasonably prudent (police officer, etc.) would not have done in the same or similar situation or failed to do something a reasonably prudent (police officer, etc.) would have done in the same or similar situation.

To make this decision, you should consider all the evidence including any generally accepted standards adopted and used by (police officers, etc.) in the same or similar situation.

If you are reasonably satisfied from the evidence that a reasonably prudent (police officer, etc.) in the same or similar situation would have ended the pursuit and that (name of defendant)'s failure to end the pursuit caused (name of plaintiff) harm, you must return a verdict for (name of plaintiff). If (name of plaintiff) did not prove both of these things to your reasonable satisfaction from the evidence, you must return a verdict for (name of defendant).

Notes on Use

This instruction is based on *Seals v. City of Columbia*, 641 So.

2d 1247 (Ala. 1994) (Seals II), and should be used when the plaintiff claims the police officer should have ended pursuit of a violator or suspected violator.

The instruction can be modified when the claim is that the police officer should not have pursued the violator in the first place. See, *Gooden v. City of Talladega*, 966 So. 2d 232 (Ala. 2007) (issue raised but not addressed because the court held police officer's conduct was not the cause of the decedent's harm). *Gooden* affirmed that unless the defendant's conduct is negligent or wanton the defendant is not responsible for plaintiff's harm even though the pursuit may contribute to the violator's reckless driving.

References

Seals v. City of Columbia, 641 So. 2d 1247 (Ala. 1994) (Seals II).

See references in APJI 26.40.

**APJI 26.42 POLICE OFFICER—WANTON
FAILURE TO END PURSUIT [PL]**

Defendant (name of defendant) was a (police officer) (highway patrolman) (other) employed by (name of government agency). (He/she) was in pursuit of (name of suspected violator) when (name of plaintiff) was harmed.

(Name of plaintiff) says (name of defendant) wantonly failed to end (his/her) pursuit of (name of violator) and the failure to end the pursuit caused (name of plaintiff) harm. (Name of plaintiff) says (name of defendant) should have ended the pursuit because (state plaintiff's reasons).

To decide if (name of defendant)'s conduct was wanton, you must decide whether (name of defendant) consciously acted or failed to act with a reckless or conscious disregard of the rights or safety of others and (he/she) was aware that harm would likely or probably result.

To make this decision, you should consider all the evidence including any generally accepted standards adopted and used by (police officers, etc.) in the same or similar situation.

If you are reasonably satisfied from the evidence that (name of defendant) wantonly failed to end the pursuit and the failure to end the pursuit caused (name of plaintiff) harm, you must return a verdict for (name of plaintiff). If (name of plaintiff) did not prove both of these things to your reasonable satisfaction from the evidence, you must return a verdict for (name of defendant).

Notes on Use

This instruction is based on *Seals v. City of Columbia*, 641 So. 2d 1247 (Ala. 1994) (Seals II), and should be used when the plaintiff claims the police officer should have ended pursuit of a violator or suspected violator.

The instruction can be modified when the claim is that the po-

lice officer should not have pursued the violator in the first place. See, *Gooden v. City of Talladega*, 966 So. 2d 232 (Ala. 2007) (issue raised but not addressed because the court held the police officer's conduct was not the cause of the decedent's harm). *Gooden* affirmed that unless the defendant's conduct is negligent or wanton the defendant is not responsible for plaintiff's harm even though the pursuit may contribute to the violator's reckless driving.

A municipality cannot be sued for wanton conduct. Ala. Code § 11-47-190 (1975) (West's Alabama Code). *Town of Loxley v. Coleman*, 720 So. 2d 907 (Ala. 1998).

References

Seals v. City of Columbia, 641 So. 2d 1247 (Ala. 1994) (*Seals II*).

See references in APJI 26.40.

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